These notes relate to the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) which received Royal Assent on 15 January 2007

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 1 – Bankruptcy

Duration of bankruptcy

Section 1 – Discharge of debtor

6. This section provides for the reduction of the automatic bankruptcy period from 3 years to 1 year by amending section 54 of the 1985 Act. The title of section 54 has been changed to reflect the abolition of the 3-year period.

7. Transitional provisions may be made under section 225 of this Act to deal with individuals who have already been sequestrated when this section is commenced, have not been discharged at that date.

Bankruptcy restrictions orders and undertakings

Section 2 – Bankruptcy restrictions orders and undertakings

8. Section 2(1) of this Act inserts new sections 56A to 56K into the 1985 Act which introduce bankruptcy restrictions orders (BROs) and bankruptcy restrictions undertakings (BRUs). Currently all undischarged bankrupts are subject to a number of restrictions and disqualifications for the period up to discharge. BROs and BRUs are a way of imposing particular restrictions on debtors for a particular period after discharge depending on the debtor's conduct in relation to the bankruptcy.

New section 56A – Bankruptcy restrictions order

9. Section 56A provides that an application for a BRO can be made only if the debtor is a natural person. The BRO and BRU regime does not apply to partnerships and limited partnerships. The application can be made only by the Accountant in Bankruptcy (the "AiB") and is made to a sheriff.

New section 56B – Grounds for making order

10. Section 56B details the kinds of conduct the sheriff has to take account of when deciding whether to grant an application for a BRO. The conduct of the debtor both before and after the date of sequestration can be taken into account. The sheriff is to take into account factors including possible gratuitous alienations and unfair preferences. In addition to taking account of gratuitous alienations and unfair preferences within

the meaning of those terms as defined in the 1985 Act, the sheriff can consider any alienation or preference which is challengeable under common law.

New section 56C – Application of section 67(9)

11. Section 56C provides the sheriff with the power to apply section 67(9) of the 1985 Act to the debtor during the time the BRO is in force. Section 67(9) states that a debtor, who has obtained credit in excess of £500 in a single transaction without informing the lender of the debtor's status as an undischarged bankrupt or as someone subject to a BRO or BRU made in England and Wales, will have committed an offence. This offence will also apply to any debtor who, over a number of transactions, obtains any amount of credit above a maximum level of £1,000. The effect of section 56C is to permit the sheriff to apply these restrictions to a debtor subject to a BRO made in Scotland under section 56B.

New section 56D – Timing of application for order

12. Section 56D details the time limits within which an application for a BRO can be made. The application must be made after the date of sequestration and before the date of the debtor's discharge from bankruptcy. Any applications submitted after the date of the debtor's discharge will be allowed only with the sheriff's permission.

New section 56E – Duration of order and application for annulment

13. Section 56E provides details of the start and end dates of any BRO. Subsection (2) states that the minimum time a BRO can run is 2 years and the maximum time is 15 years from the date of the order. Subsection (3) provides that the sheriff may annul or vary a BRO if the debtor applies for it. No provision is made for the grounds on which a sheriff may annul or vary a BRO, it is left to the sheriff to consider whether such action is appropriate in all the circumstances.

New section 56F – Interim bankruptcy restrictions order

14. Subsections (1) to (3) of section 56F provide for the application for and the making of interim BROs.

15. Interim BROs can be made by the sheriff at any time between the making of an application for a full BRO and the decision on the application for the full BRO. The sheriff would have to be satisfied that, based on the case presented by the AiB, the full BRO application is likely to be successful and that making an interim order is in the public interest.

16. Subsections (4) to (6) provide for the effect and duration of an interim order. An interim order has effect as if it was a full BRO and restrictions will apply on the making of the interim BRO. Where an interim order is followed by a full BRO, the duration of the full order set out under section 56E starts from the date the interim order was made.

New section 56G – Bankruptcy restrictions undertaking

17. Section 56G provides for bankruptcy restrictions undertakings (BRUs). A BRU is an agreement between the debtor and the AiB whereby the debtor is bound by specified restrictions without the need for an application to the sheriff. BRUs can last for the same length of time as BROs and have the same force and effect.

New section 56H – Bankruptcy restrictions undertakings: application of section 67(9)

18. Section 56H provides for section 67(9) of the 1985 Act to apply to a debtor who is subject to a BRU if the debtor has specified in the undertaking that it is to apply and the AiB has approved the undertaking on those terms. Section 67(9) states that a debtor,

who has obtained credit in excess of £500 in a single transaction without informing the lender of the debtor's status as an undischarged bankrupt or as someone subject to a BRO or BRU made in England and Wales, will have committed an offence. This offence will also apply to any debtor who, over a number of transactions, obtains any amount of credit above a maximum level of £1,000. The effect of section 56H is to apply these restrictions to a debtor subject to a BRU entered into in Scotland under section 56G.

New section 56J– Effect of recall of sequestration

19. Section 56J addresses what will happen to a BRO or BRU that is in force when a debtor's sequestration is recalled. The sheriff has discretion to recall any BRU or BRO in place. If the sheriff does not recall the BRO or BRU, the debtor has 28 days to appeal. After a sequestration has been recalled, no new BRO or BRU can be made even if, in the case of a BRO, an application had been made and was pending before the sheriff.

New section 56K – Effect of discharge on approval of offer of composition

20. Section 56K provides for the continuation of a BRO or BRU if a debtor obtains a discharge by way of an offer of composition.

21. Section 2(2) of this Act amends section 1A(1)(b) of the 1985 Act with the effect that the AiB is placed under a duty to include BRUs and BROs in the register of insolvencies.

Effect of bankruptcy restrictions orders and undertakings

Section 3 – Disqualification from being appointed as receiver

22. This section extends the restriction on those who are allowed to be a receiver in Scotland, to include those debtors who are subject to a BRO or BRU made under the new provisions in the 1985 Act or under the equivalent regime in England and Wales.

Section 4 – Disqualification for nomination, election and holding office as member of local authority

23. This section extends the restriction on those who are allowed to hold office as a member of a local authority, by inserting section 31(1)(ba) into the Local Government Scotland Act 1973, to include those debtors who are subject to a BRO or BRU made under the 1985 Act or under the equivalent regime in England and Wales.

Section 5 – Orders relating to disqualification

24. This section inserts new section 71B into the 1985 Act which gives the Scottish Ministers power to make an order that can modify or amend the effect of a provision which restricts or prevents debtors (or particular categories of debtors) from holding particular offices or positions or from being members of particular bodies or groups. Such provisions are given the label "disqualification provisions". One of the things which an order under section 71B can do is extend a disqualification provision to persons subject to a BRO or BRU. Orders under section 71B are subject to the affirmative resolution procedure of the Scottish Parliament.

The trustee in the sequestration

Section 6 – Amalgamation of offices of interim trustee and permanent trustee

25. This section amends sections 2 and 3 of the 1985 Act. It has the effect, when read together with the repeal of section 2(4) of the 1985 Act (see Part 1 of schedule 6 to this Act), that in a sequestration where an interim trustee has been appointed, he or she is no longer required to—

- ascertain the reasons for and circumstances surrounding the insolvency; or

- ascertain the state of the debtor's liabilities and assets.

26. Those functions will instead be carried out by the trustee in sequestration who is appointed when sequestration is awarded and who combines the existing roles of the interim trustee and permanent trustee from the date of the award.

27. The interim trustee now has the sole function of safeguarding the debtor's estate pending a decision on the award of sequestration. The interim trustee can now be in place only for the limited period between the creditor presenting the petition for sequestration and the award of (or refusal to award) sequestration.

28. The interim trustee is obliged to co-operate with the AiB and supply whatever information the AiB may need to carry out the AiB's functions (in particular the AiB has a general supervisory function in relation to all interim trustees (see section 1A(1)(a)(i) of the 1985 Act)). The obligation to supply information applies to both interim trustees who are in office and who have left office, either because the case was dismissed or another trustee has replaced them. If an interim trustee's obligation under this provision was extinguished after they left office, the AiB's ability to supervise and investigate the way in which a sequestration was managed would be restricted. The AiB would not be able to rely on getting information from an interim trustee unless they remained in office.

29. Subsection (3) provides for all references to interim trustees and permanent trustees in other legislation to be read as references to the new style trustee in sequestration unless it is clear from the context that a reference to the interim trustee should continue to be a reference to the new style of interim trustee.

Section 7 – Repeal of trustee's residence requirement

30. Section 7 removes the requirements in sections 2(3)(a) and 24(2)(d) of the 1985 Act that all trustees must live within the jurisdiction of the Court of Session.

Section 8 – Duties of trustee

31. Section 8(1) inserts new subsections (3A) and (8) into section 3 of the 1985 Act, which as amended by this Act provides for the functions of the trustee in sequestration.

32. Section 3(3A) of the 1985 Act clarifies that the trustee has a duty to report any behaviour of the debtor to the AiB, if the trustee considers that the behaviour would merit a bankruptcy restrictions order or undertaking. Any such report will be absolutely privileged.

33. Section 3(8) of the 1985 Act qualifies the responsibility of the trustee to adhere to some of the requirements of section 3. In particular, the trustee is now given leeway to depart from functions of:

- recovering, managing and realising the debtor's estate;
- distributing the estate amongst the creditors according to their respective entitlements;
- ascertaining the reasons for the debtor's insolvency, and the circumstances surrounding it; and
- ascertaining the state of the debtor's liabilities and asset,

if the trustee thinks that doing so is in the best interests of the creditors and would be financially beneficial to the estate.

34. In a similar vein, subsection (2) inserts new subsection (9) into section 39 of the 1985 Act, which provides that the trustee need not do anything permitted by section 39 nor

comply with the requirements about realising secured property unless that is in the best interests of the creditors and would be financially beneficial to the estate.

35. Subsection (3), by inserting a new subsection (2A) into section 49 of the 1985 Act, also imposes an obligation on the trustee to circulate details of the creditors' claims and the amount accepted to the debtor and all known creditors.

Section 9 – Grounds for resignation or removal of trustee

36. This section deals with the reasons for which an interim trustee or a trustee can resign or be removed from office.

37. Subsection (1) makes amendments to section 13 of the 1985 Act removing the interim trustee's right to resign "for any reason whatsoever". The interim trustee must now be incapable of acting, as defined by section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (asp 4), or be incapacitated in some other way.

38. Subsection (2) inserts words into section 28(1) of the 1985 Act making it clear that the trustee in sequestration continues to be permitted to resign if he or she is unable for any reason to act as trustee.

Section 10 – Termination of interim trustee's functions

39. This section inserts new sections 13A and 13B into the 1985 Act.

New section 13A – Termination of interim trustee's functions where not appointed as trustee

40. Section 13A provides for the termination of an interim trustee's functions when a sequestration petition is dismissed or sequestration is awarded and someone other than the interim trustee is appointed as trustee in sequestration. The interim trustee must, within 3 months of the determination of the petition, submit his or her accounts along with any claim for remuneration to the AiB for audit (this does not apply under section 13B where the AiB is the interim trustee). The interim trustee is also obliged to circulate copies of the accounts to the debtor, the creditors and the new trustee. All of these people are permitted to appeal to the sheriff against the AiB's determination fixing the fees and outlays payable to the interim trustee.

41. The sheriff may make such determination of who is liable for the fees and outlays of the interim trustee appointed under section 2(5) of the 1985 Act as may be appropriate, with the determination of that amount to be by AiB, whose decision is final.

42. The amendments of the 1985 Act made by schedule 1 to this Act mean that there would be no mechanism for discharging interim trustees, within the new meaning of that term. Sections 13A(6) to (11) provide that mechanism.

43. Subsections (11), (12), (13) and (14) of section 13A clarify what happens when the AiB grants, or refuses to grant, a discharge to an interim trustee. The debtor, the creditors, the interim trustee or the new trustee can appeal to the sheriff against the decision of the AiB. If the appeal is successful the sheriff can order the AiB to either issue a certificate of discharge that has been refused, or withdraw one that has been granted.

New section 13B – Termination of Accountant in Bankruptcy's functions as interim trustee where not appointed as trustee

44. New section 13B of the 1985 Act is similar to section 13A but caters for the case where the AiB was the interim trustee but does not become the replacement trustee when sequestration is awarded.

Section 11 – Statutory meeting and election of trustee

45. An interim trustee, other than the AiB, is currently obliged to call and hold a statutory meeting of creditors within 60 days of the date of the award of sequestration. Subsections (1) and (2) of section 11 repeal section 21 and amend section 21A of the 1985 Act so that the trustee in sequestration may hold a statutory meeting at such time and place as the trustee may determine, and shall give notice to the creditors of any such meeting not later than 60 days after the date of award of the sequestration (and not the date of the sequestration which, in a creditor petition, is the date of the warrant for service on the debtor and which is currently the starting point for the time limit when the AiB is the trustee).

46. Subsections (4) and (5), combined with various amendments made by schedule 1, make alterations to the 1985 Act dealing with the process of voting for a trustee when a statutory meeting is called. Under the new process the creditors can vote to retain the trustee in sequestration who was appointed on the award being made or they can vote to replace that person with a new trustee in sequestration.

Section 12 – Replacement of trustee acting in more than one sequestration

47. Currently, the AiB must make applications for each case and in every sheriff court in which an insolvency practitioner was appointed as trustee, when that trustee is no longer qualified to act. This section inserts a new section 28A into the 1985 Act which simplifies this procedure to allow the AiB to make one application, to the Court of Session, covering all cases and seeking a court order filling the vacated offices of the original trustee with a new trustee.

48. An Act of Sederunt (that is to say court rules) may provide that intimation of the appointment of a new trustee under section 28A is made to the sheriff who awarded the sequestration or to the sheriff to whom it is transferred.

Section 13 – Requirement to hold money in interest bearing account

49. Section 43 of the 1985 Act provides that monies received by a trustee must be deposited in an appropriate bank or institution, as defined in section 73(1) of the Act. This section amends section 43 to introduce a requirement for monies to be deposited in an interest bearing account.

Debtor applications

Section 14 – Debtor applications

50. Section 14(1) of this Act extends section 1A of the 1985 Act to add determining debtor applications for sequestration to the other functions of the AiB.

51. A “debtor application” is the name given to the new process by which a debtor applies to the AiB for his or her estate to be sequestrated. This replaces the current process where a debtor has to petition the court. Creditors seeking sequestration of a debtor’s estate will continue to have to petition the sheriff (see the changes made by section 16 of this Act).

52. Subsections (2) to (8) make a number of amendments of the 1985 Act setting up the procedure for debtor applications.

53. Subsection (2) inserts new subsections (1A) to (1C) into section 2 of the 1985 Act giving the AiB power to appoint a trustee in sequestration following a debtor application or deeming the AiB to be the trustee if no-one else is appointed. In a case where the debtor meets the criteria for being a low income, low asset debtor (under new section 5A of the 1985 Act, inserted by section 15(2) of this Act) subsection (1C) provides that the AiB is to be the trustee.

54. Subsections (3)(a) and (4) make amendments setting out who can make debtor applications and who must proceed by petition to the sheriff.

55. Subsection (3)(b) inserts new subsections (4B) and (4C) into section 5 of the 1985 Act, providing that debtor applications are to be made to the AiB, and giving the Scottish Ministers power to make regulations setting out the procedure in and form of debtor applications, and setting the fees that the AiB may charge in relation to those applications.

56. Subsection (5) inserts new section 6B into the 1985 Act which provides that a debtor making a debtor application has to state whether the debtor's main place of business is in the UK or elsewhere in the EU or whether the debtor has an establishment in the UK or elsewhere in the EU. If the debtor is already subject to proceedings elsewhere in the EU and those proceedings are regarded under EU law as main proceedings for insolvency then the debtor has to send a copy of the debtor application to the person in charge of those proceedings.

57. Subsection (6) inserts new section 8A into the 1985 Act which makes provision for debtor applications in similar terms to the provisions relating to petitions in section 8 of that Act.

58. Subsection (7) makes amendments to section 9 of the 1985 Act. It provides that the AiB may determine debtor applications from debtors who live in Scotland, have an established place of business in Scotland or, if the debtor is not a natural person, who were constituted under Scots law and carried on business in Scotland at any time.

Section 15 – Debtor applications by low income, low asset debtors

59. Section 15(1) of this section inserts into section 5(2B)(c) of the 1985 Act an additional criteria under which a debtor can apply to the AiB for sequestration. The new criterion is that the debtor is unable to pay his or her debts and meets the conditions listed in new section 5A of the 1985 Act. Note, however, that the new criteria is additional to the existing requirements of sub-section (2B) of section 5 of the 1985 Act, and debtor will therefore still have to satisfy the qualifying debt limit threshold and the bar on being sequestrated twice in any 5-year period as set out in paragraphs (a) and (b) of that subsection.

60. Subsection (2) inserts new section 5A into the 1985 Act.

New section 5A – Debtor applications by low income, low asset debtors

61. Section 5A sets out the conditions under which the new criteria in section 5(2B)(c) will be met. The conditions are set out in subsections (2) to (4) and generally relate to the debtor having a low level of income and a minimal amount of assets. Subsection (5) gives the Scottish Ministers the power to make regulations setting out what income and assets are to be included and how they are to be determined for the purposes of subsections (2) to (4). It also provides the power to add further conditions and to vary or remove those further conditions. The power in subsection (5) is subject to the affirmative resolution procedure of the Scottish Parliament (see new section 72(2) and (3) of the 1985 Act as inserted by section 35 of this Act).

Jurisdiction

Section 16 – Sequestration proceedings to be competent only before sheriff

62. This section provides for the removal of the jurisdiction of the Court of Session in respect of petitions for sequestration or for recall of sequestrations, which are to be heard by the sheriff alone. Actions of reduction and suspension in relation to a sequestration will continue to be dealt with by the Court of Session.

63. This section amends several sections of the 1985 Act, including section 15 which makes further provisions relating to sequestrations. It should be noted that appeals against the AiB's refusal to award sequestration on a debtor application will also be heard by the sheriff (see section 15(3A) of the 1985 Act, inserted by paragraph 13 of schedule 1 to this Act), and appeals against a decision of the sheriff to transfer a sequestration to any other sheriff will be heard by the sheriff principal (see section 15(2A) of the 1985 Act, inserted by subsection (2)(c) of this section).

64. There are a number of amendments of the 1985 Act contained in schedule 1 which are consequential on the changes made by this section.

Vesting of estate and dealings of debtor

Section 17 -Vesting of estate and dealings of debtor

65. This section amends sections 31 and 32 of the 1985 Act. These changes arise from issues which first came to light in the case of *Sharp v Thompson*, 1997 SC (HL) 66. Although that case concerned a person who had purchased property from a debtor subject to a floating charge, it highlighted issues relevant to sequestration. The Scottish Law Commission issued a discussion paper (No. 114) in 2001 dealing with these issues and proposing some changes to the law relating to sequestration. Then in 2004 the case of *Burnett's Tr. v Grainger*, 2004 SC (HL) 19, which concerned a sequestrated debtor, clarified the position of a purchaser whose title was unregistered and reinforced the need for some of the reforms proposed by the Law Commission. This section makes a number of those proposed changes in light of the decision in *Burnett's Tr*.

66. This section does four things (all of which are connected by a general theme of protecting a person who has for value purchased heritable property from a debtor, whether before or after the debtor goes bankrupt).

67. First, it provides that a trustee in sequestration is precluded from registering title to heritable property of a debtor for 28 days after the award of sequestration is itself registered. That enables a third party who has purchased property in good faith from a debtor to complete title by registration provided it is done with expedition (see new section 31(1A) and (1B) of the 1985 Act inserted by subsection (1)(a)).

68. Secondly, it makes clear that heritable property which a debtor has sold or otherwise transferred remains part of the debtor's estate which is given over to the trustee in sequestration if the person to whom the property is transferred has yet to complete title by registration (this is linked to the first purpose in that a trustee's rights can be defeated by the other person if that person registers first, and that person has a 28 day head start). This is considered to be the existing position in law but it is considered that this is based on the fact that section 31 of the 1985 Act treats sequestration as if it was an adjudication. The diligence of adjudication is abolished by this Bill so the position needs to be clarified (see new section 31(8)(aa) of the 1985 Act inserted by subsection (1)(b)).

69. Thirdly, this section makes clear that dealings with a debtor after the date of sequestration are void in any question with the trustee where they relate to property which the trustee gets at the date of sequestration **and** where they relate to property the debtor acquires after sequestration but which is passed to the trustee (the position regarding the latter is currently unclear, this provision resolves that uncertainty) (see the amendment of section 32(8) of the 1985 Act made by subsection (2)(a)).

70. Finally, the amendments make it clear that where a person deals with a debtor after the date of sequestration the dealing is not void if it relates to incorporeal (i.e. intangible) or heritable property, was done in good faith and for an adequate value, was done during the period of 7 days after the sequestration is registered (which allows for the period, sometimes called a "registration gap", when a sequestration has been granted but there has not been enough time for it to appear in any register) and the person

had no knowledge (and ought not to have had knowledge) of the sequestration. This change to the law on dealings with a debtor protects persons who deal with the debtor right around the time a sequestration is awarded and who could not know about the sequestration even if they take all the normal steps (i.e. they search the appropriate registers) (see the amendment of section 32(9) made by, and new section 32(9ZA) inserted by, subsection (2)(b) and (c)).

Income received by debtor after sequestration

Section 18 – Income received by debtor after sequestration

71. This section amends section 32 of the 1985 Act introducing income payment orders (IPOs) and income payment agreements (IPAs). An IPO is an order requiring the debtor to pay to the trustee a proportion of any income the debtor receives after the award of sequestration. The order may require a third party to pay income due to the debtor straight to the trustee instead. It must, subject to one exception (see paragraph 72 below), be applied for by the trustee before the date of the debtor's discharge. It can run for a maximum period of 3 years and the application must state what period is being applied for. Debtors may be subject to criminal penalties if they default on payments (see new subsection (2ZA) of section 32).

72. An IPA is a formal written agreement between the debtor and the trustee in the same terms as an IPO, but without the requirement of court involvement, and without the possibility of criminal sanctions for defaulting (see new subsection (4F) of section 32). Section 32(4L) of the 1985 Act provides for one exception to the rule that an IPO cannot be applied for after the debtor has been discharged from sequestration. If a debtor has failed to maintain payments agreed under an IPA the trustee can apply to the sheriff to have the remaining payments due converted to an IPO. The application can be made before or after the date of the debtor's discharge.

Debtor's home and other heritable property

Section 19 – Debtor's home and other heritable property

73. Subsection (1) amends section 32 of the 1985 Act by inserting new subsections (9A) and (9B) into that section. Subsection (9A) provides that, when a trustee gives heritable property back to a debtor, written notification by the trustee is evidence that the debtor is now the owner of the property. Subsection (9B) provides that the trustee must register the notice of abandonment in the Register of Inhibitions. This ensures that anyone dealing with the debtor can see from a search of that register that the debtor is the owner. A search of that register would reveal the existence of the sequestration and without evidence of the notice of abandonment it would appear to a searcher that the property was still owned by the trustee for the creditors in the sequestration. The form of the notice will be prescribed by the Scottish Ministers.

74. Subsection (2) inserts new section 39A into the 1985 Act.

New section 39A – Debtor's home ceasing to form part of sequestrated estate

75. Section 39A provides for the ownership or other right in a debtor's family home, which is part of the sequestrated estate, to be returned to the debtor if the trustee has not taken any action in relation to that property within 3 years of the date of sequestration. If the trustee discovers the interest in the property at a later date, the 3-year period runs from the date the trustee became aware of the property.

76. Subsection (3) of section 39A lists the types of action the trustee may take which would prevent the home being returned to the debtor. The Scottish Ministers may modify that list by regulations.

77. Subsection (8) of section 39A gives the Scottish Ministers power to make regulations setting out circumstances in which the 3-year period may be shortened or where section 39A will not apply or where the sheriff may decide that the section does not apply. The regulations can also make provision for compensation. These regulations are subject to negative resolution procedure.

Protected trust deeds

Section 20 – Modification of provisions relating to protected trust deeds

78. This section amends Schedule 5 to the 1985 Act to provide the Scottish Ministers with a regulation-making power setting out what conditions are required in order for a trust deed to become protected and the extent to which a debtor may be discharged, by virtue of a protected trust deed from all or part of his or her liabilities.

Modification of composition procedure

Section 21 – Modification of composition procedure

79. This section amends Schedule 4 to the 1985 Act which sets out the procedure for an offer of composition (which is a settlement offer made by a sequestrated debtor to the creditors which, if accepted, results in the debtor being discharged). Offers of composition will now be made by the debtor to the trustee and passed for approval to the AiB rather than to the court.

80. The previous requirement for active agreement by the creditors is changed so that those creditors who do not actively object and have been notified of the offer will be considered to have agreed to the offer of composition.

Status and powers of Accountant in Bankruptcy

Section 22 – Status of Accountant in Bankruptcy as officer of the court

81. This section makes it clear that the AiB has duties to the court in the same way as a solicitor or advocate would have.

Section 23 – Accountant in Bankruptcy's power to investigate trustees under protected trust deeds

82. This section amends section 1A of and Schedule 5 to the 1985 Act to extend the powers of the AiB in respect of protected trust deeds. The AiB will now be able to audit the trustee's accounts and fix the trustee's remuneration in protected trust deeds without the requirement of a request from creditors to do so.

Offences

Section 24 – Modification of offences under section 67 of the 1985 Act

83. This section amends section 67 of the 1985 Act. It widens the grounds of the offence in subsection (2) of that section to include the disposal of assets. It repeals subsection (8) so that a failure to keep records is no longer an offence under section 67.

84. The limit set out in subsection (9) on credit that can be applied for, without disclosing the information required about the debtor's circumstances, is increased to £500. A further requirement to disclose the required information is added to subsection (9), and applies where a debtor already has debts of at least £1,000 (or another amount which is substituted for the £1,000 by the Scottish Ministers in regulations made under the power now contained in subsection (9)) the debtor has to disclose the required information when applying for any amount of credit.

85. New subsection (9A) provides that, in calculating the amount of credit in relation to the limits in subsection (9), any liability for utility supplies or council tax can be ignored.

86. The amendments of subsection (10) provide that a failure to disclose a BRO or BRU made in England or Wales amounts to a failure to provide the information required in subsection (9). The same provision is made for BROs and BRUs made in Scotland by new sections 56C and 56H of the 1985 Act respectively (see paragraphs 1111 to 1818 above).

87. The addition of new subsection (11A) clarifies that an act prohibited by section 67 of the 1985 Act will still be an offence in Scotland even if it takes place elsewhere in the UK.

Miscellaneous and general

Section 25 - Debt limits in sequestrations

88. This section amends the qualifying debt limit threshold, which sets out the minimum amount of debt that must be owed in order for a person to be sequestrated (see paragraph 59 above). It provides that a debtor must have debts of £3,000 or more. The amount of the qualifying debt limit can be amended by regulations (subject to affirmative resolution procedure).

Section 26 – Creditor to provide debt advice and information package

89. This section amends section 5 of the 1985 Act to introduce a requirement for creditors to have provided debtors with a copy of a debt advice and information package before the creditor can petition for sequestration. The debt advice and information package is the same package required, in the case of attachment of moveables, by section 10 of the 2002 Act.

Section 27 – Continuation of sequestration proceedings

90. Section 27 makes amendments to section 12 of the 1985 Act.

91. Under new subsection (3B) of that section, the sheriff can continue a creditor petition for sequestration for any period up to a maximum of 42 days if the debtor is able to demonstrate to the court that they will be able to pay or satisfy the petitioning creditor's debt, and any other debts due to creditors concurring in the petition, within that time.

92. Section 27 also inserts a new subsection (3B) into that section which gives a sheriff the option of continuing a creditor petition for sequestration if the sheriff is satisfied that a debt payment programme (DPP) is pending under the debt arrangement scheme (set up under the 2002 Act).

93. If a debtor attends court to show cause why sequestration should not be awarded, and can provide sufficient evidence that a DPP application is ongoing or is about to be made, the sheriff has the power under subsection (3C) to delay awarding sequestration for as long as the sheriff thinks is necessary. Under section 4(3) of the 2002 Act a creditor is barred from petitioning for sequestration in respect of a debt which is covered by a DPP. So if the DPP is approved during the period of continuation granted by the sheriff under new subsection (3C) it would then be incompetent to sequestrate the debtor on that petition.

Section 28 – Abolition of summary administration

94. This section repeals various provisions of the 1985 Act with the effect that the Certificate of Summary Administration (COSA) procedure is abolished.

Section 29 – Non-vested contingent interest reinvested in debtor

95. This section inserts new section 31(5A) into the 1985 Act. Section 31(5) of that Act gives the trustee the right to non-vested contingent interests (potential assets) as if an assignation (transferring rights to those assets) of the interest had been executed by the debtor and intimation of the assignation made at the date of sequestration. This meant that the trustee continued to hold the right to these interests even after the debtor was discharged. The most common example would be where the debtor was the beneficiary under a will at sequestration, and the testator was still alive when the debtor was discharged. In such a case, if the debtor subsequently inherited an asset under the will, it would vest in the trustee.

96. This was not the case prior to section 97(4) of the Bankruptcy (Scotland) Act 1913. New section 31(5A) returns the law to the position as it was prior to the 1913 Act; non-vested contingent interests will no longer remain vested in the trustee after the debtor is discharged.

Section 30 – Debtor's requirement to give account of state of affairs

97. This section inserts new section 43A into the 1985 Act which impose a duty on the trustee to require any debtor who is not discharged or who is subject to an IPO or IPA to give the trustee an account in writing providing details of income and expenditure every 6 months.

Section 31 – Restriction of debtor's rights to appeal under sections 49(6) and 53(6) of the 1985 Act

98. Section 49(6) of the 1985 Act allows the debtor or any creditor to appeal against an adjudication by the trustee in sequestration on claims. Section 53(6) of that Act allows the same parties to appeal against the trustee's remuneration and outlays.

99. This section inserts a new subsection (6A) into both sections introducing a restriction on the right of appeal by the debtor. The debtor can now appeal only if the debtor has a financial interest in the outcome of the appeal, such as a right to a reversion of funds after dividend.

Section 32 – Status of order on petition to convert protected trust deed into sequestration

100. This section inserts a new subsection (2A) into section 59C of the 1985 Act. It applies to the situation where a sheriff grants an application by a person in charge of proceedings akin to sequestration commenced in another EU country which requests the conversion of a protected trust deed granted by the debtor into sequestration of the debtor's estate. The sheriff's order granting that conversion is to be treated as if it is an award of sequestration granted by the AiB following a debtor application.

Section 33 – Power to provide for lay representation in sequestration proceedings

101. Section 33 inserts a new paragraph (m) into section 32(1) of the Sheriff Courts (Scotland) Act 1971 (which deals with the regulation of civil procedure in the sheriff courts). This new paragraph gives power to the Court of Session by Act of Sederunt (that is to say court rules) to permit a debtor to be represented by a person who is not a qualified advocate or solicitor at the hearing where the sheriff decides whether or not to award sequestration following a petition by the creditor (see section 12 of the 1985 Act). The Act of Sederunt may specify particular circumstances where a debtor can be represented by a non-lawyer at such hearings (for example, the debtor may have to satisfy particular criteria).

Section 34 – Treatment of student loans on sequestration

102. Debtors who are sequestrated in Scotland are currently discharged from their liabilities in respect of student loans. This section amends the enabling power in the Education (Scotland) Act 1980 to allow regulations made under that Act to exclude from discharge loans under that Act. It also directly excludes from discharge loans which have been made under the Education (Student Loans) Act 1990.

Section 35 – Certain regulations under the 1985 Act: procedure

103. This section provides that any regulations made by the Scottish Ministers under sections 5(2B)(a) or (4), 5A or 39A(4) of the Bankruptcy (Scotland) Act 1985 shall be subject to affirmative parliamentary procedure. In addition, the first regulations under paragraph 5 of Schedule 5 to the 1985, made after the amendments of that schedule by this Act are brought into force, are also subject to affirmative procedure.

Schedule 1 – Minor and Consequential Amendments of the 1985 Act (Introduced by Section 36)

104. This schedule contains a number of minor amendments of the 1985 Act and amendments of that Act consequential on the provisions in Part 1 of this Act.

105. Paragraph 4(3)(b) clarifies that where the debtor meets the criteria in paragraphs (a) and (b) of section 5(2B) of the 1985 Act (which sets out the criteria which must apply before a living debtor can be sequestrated) and is liable to sequestration on the criterion that the debtor has granted a trust deed which has not become a protected trust deed, that the trust deed in question must have failed to become protected in accordance with the regulations under schedule 5, paragraph 5 of the 1985 Act (as inserted into that Act by section 20 of this Act).

106. Paragraph 8 inserts new sections 10 and 10A into the 1985 Act.

New section 10 – Duty to notify existence of concurrent proceedings for sequestration or analogous remedy

107. Section 10 deals with the duty to notify the existence of concurrent proceedings for sequestration or proceedings which are similar to sequestration.

108. Where a debtor or a concurring or petitioning creditor is aware of the existence of another sequestration, of proceedings that may lead to sequestration, or of proceedings that are similar to sequestration in relation to the same debtor, that person must notify the sheriff (or the AiB in the case of a debtor application) of the existence of the other proceedings. Subsections (4) to (6) set out the consequences of failure to notify on the part of any of those persons. A petitioner may be liable for the expenses of presenting the petition, a concurring creditor may be liable for the expenses of a debtor application, and a debtor shall be guilty of an offence and liable on summary conviction to a fine up to the limit at level 5 on the standard scale.

New section 10A – Powers in relation to concurrent proceedings for sequestration or analogous remedy

109. New section 10A of the 1985 Act sets out what may be done when any of the other proceedings listed in section 10(2) are in progress or have been completed.

110. Paragraph 20 changes the time limit for a trustee to give notice of intention to call a statutory meeting in section 21A(2) of the 1985 Act to 60 days from the date on which sequestration is awarded. It was previously 60 days from the date of sequestration which, in the case of a creditor petition, would be the date on which the sheriff grants warrant to cite the debtor – i.e. before the hearing where sequestration is awarded. Because of the provisions introduced by section 27 of this Act allowing hearings to be continued, it is possible for 60 days to pass from the date of the warrant to cite to

the award of sequestration. Hence the change to the start point for the time limit for deciding whether to call the statutory meeting.

111. Paragraph 35(4)(a) clarifies that, under section 39 of the 1985 Act, a trustee can shut down a debtor's business instead of carrying on the business (which section 39 already permitted the trustee to do).

112. Paragraph 42(a) has the effect that any creditor's claim submitted to the trustee in sequestration shall not prescribe after 5 years, unless the trustee has rejected the claim in whole. This covers cases where the trustee makes no final decision on the claim within 5 years after the date of the sequestration or has, by that point, only partially rejected the claim (say, because there are insufficient assets from which the expense of such a decision can be recovered). In such cases, the creditor will not have to resubmit the claim during the period of the sequestration in order to bar the effect of prescription, and will therefore be entitled to a dividend (or further dividend) if any estate is realised after 5 or more years has elapsed.

113. Paragraph 45 provides that it is not necessary for a trustee to submit any legal account to the Auditor of Court for taxation if the commissioners, or if there are no commissioners, the AiB has determined that the account can be settled without taxation.

114. Paragraph 46 inserts new section 53A into the 1985 Act which modifies the procedure under section 53 of that Act where the AiB is trustee. These relate to the determination of fees, accounts of intromissions, appeals against such determinations, and the payment of dividends.

Part 2 – Floating Charges

Registration and creation etc.

Section 37 – Register of Floating Charges

115. This section provides for the setting up of the new Register of Floating Charges under the management of the Keeper of the Registers of Scotland. The form and manner in which the Register is to be organised and maintained, and the form of documents and notices, the particulars they are to contain and the manner in which they are to be delivered to the Keeper, will be the subject of regulations made by statutory instrument. Those regulations are subject to the negative resolution procedure.

116. The date of registration of the relevant document or notice is to be the date of receipt of it by the Keeper. The intention is that (as with the Sasine Register) the Register should record the text of the document rather than, as at present, only particulars. Subject to the stipulation of appropriate regulations by the Scottish Ministers, it is intended that registration can in due course be effected electronically

Section 38 – Creation of floating charges

117. Subsections (1) and (2) of section 38 derive from section 462(1) of the Companies Act 1985 and restate the statutory rule that, in Scotland, a company may grant a floating charge. In view of the generality of the phrases "debt or other obligation" and "all or any part of the property" the reference in parentheses in the existing provision to the former including a "cautionary obligation" and the latter "uncalled capital" is unnecessary. The term "company" is defined in section 47.

118. Subsection (3) lays down the new rule that, after the new legislation enters into force, the creation of a floating charge occurs only when the document granting the floating charge is registered in the Register of Floating Charges (which is instituted in terms of section 37).

119. Subsection (4) clarifies the meaning of "document granting a floating charge" to reflect the fact that it is a company which grants a floating charge albeit by means of a document.

120. Section 462(5) of the Companies Act 1985 provides that a floating charge has effect in relation to heritable property without the need for the document granting the charge to be registered in the Land Register or recorded in the Register of Sasines. It is evident from section 28 of the Land Registration (Scotland) Act 1979 that a floating charge constitutes an "overriding interest" and is not a registrable interest. The provision that floating charges are created by registration in the Register of Floating Charges implies no further act of registration is required and the terms of section 462(5) are not re-enacted.

Section 39 – Advance notice of floating charges

121. This section makes provision for the registering of an advance notice of a floating charge. The purpose of an advance notice is to assist the mechanics of settling secured transactions by allowing parties to obtain priority of ranking from the date of the advance notice provided that settlement is completed to the extent that the floating charge is registered within 21 days of the advance notice. An advance notice cannot be registered unilaterally. The form of an advance notice, the particulars it is to contain and the manner in which it is to be delivered to the Keeper may be prescribed by statutory instrument in terms of section 37(8)(b) above. It is envisaged that the regulations will provide that the advance notice may be subscribed either by the parties or by their solicitors.

Section 40 – Ranking of floating charges

122. This section is concerned with the ranking of a floating charge both with other floating charges and with fixed securities affecting all or part of the same property as that covered by the floating charge. Subsections (1), (2) and (3) set out the leading principle that ranking proceeds on the basis of date of creation which, in the case of fixed securities is the date upon which the security was constituted as a real right. Where the floating charge is created on the same day as another floating charge or fixed security, the rule is that the respective securities rank equally.

123. Subsection (4) is concerned with a competition between a floating charge and a fixed security arising by operation of law – such as lien or a landlord's hypothec. It continues the existing rule that such fixed securities arising by operation of law have priority over any floating charge.

124. Subsections (5) and (6) continue an existing provision whereby the holder of the second, later floating charge may protect the value of the security by giving notice to the holder of the earlier floating charge. In that event, the priority of ranking of the earlier floating charge is restricted to the amount of the debt then outstanding plus any further advances which the holder of that earlier floating charge is contractually obliged to make. In view of the change in the ranking rule, the same facility is extended to the holder of a subsequent fixed security. The priority of debts is preserved by subsection (7).

Section 41 – Ranking clauses

125. The ranking of securities may be the subject of agreement among the secured creditors. Section 41(1) allows for secured creditors to enter into ranking agreements regulating the order in which floating charges are to rank in the event of insolvency.

126. Subsections (2) and (3) clarify that the rule contained in sections 40(1) and (2), that floating charges rank by date of creation, can be displaced by a ranking agreement. These subsections also clarify that the capping provisions contained in sections 40(5) and (6) can be altered by a ranking agreement. Subsection (2)(b) makes it clear that a ranking agreement cannot displace the rule contained in section 40(4) that a fixed

security arising by operation of law (such as a lien or landlord's hypothec) has priority over a floating charge.

127. Subsection (4) makes provision for requiring the consent of a floating charge (or fixed security) holder, where the holder's position would be adversely affected by the provisions of a ranking agreement. It does not require such a holder to subscribe the document granting the floating charge. In practice, it may often be impractical to require the lender to grant consent by becoming a party to the floating charge document itself. Subsection (5) therefore provides that the lender may give consent in a separate document which may be (but need not be) registered in the Register of Floating Charges. As the registration of consent will be in the interests of the borrower (it makes clear to third parties that consent was duly obtained), there is no need to impose a requirement to register.

Section 42 – Assignation of floating charges

128. The existing legislation contains no provision on assignation of floating charges but in one first instance judicial decision (*Libertas–Kommerz v Johnson*, 1977 SC 191) it was held that a floating charge was assignable on general principles of law. Section 42(1) gives statutory affirmation of the assignability of a floating charge and further provides for vesting in the assignee on registration in the Register of Floating Charges. Subsection (2) makes clear that partial assignation is possible. Subsection (3) is necessary since a floating charge may transfer not only by voluntary assignation but also by operation of law (e.g. on sequestration of the holder, the floating charge transfers to the trustee).

Section 43 – Alteration of floating charges

129. This section deals with alterations to the terms of a floating charge.

130. Section 43(2) sets out the alterations to the terms of a floating charge which must be registered, namely alterations concerning the ranking of the charge with any other floating charge or any fixed security and alterations concerning the specification of the property that is subject to the charge or the obligations that are secured by the charge.

131. An unregistered agreement to alter the terms of a floating charge would remain as a contractual agreement between the parties to it but could not affect any third party.

132. A ranking agreement is essentially an agreement between secured creditors and may be of no interest to the debtor. Accordingly, subsection (4) enables an agreement between the secured creditors, in which the debtor is not a participant, to be registered, provided that the debtor is not thereby adversely affected.

133. Subsection (5) addresses the case – exemplified in *Scottish & Newcastle plc v Ascot Inns Ltd*, 1994 SLT 1140 - in which the holder of a floating charge gives consent to specific assets, or a specific class of assets of the company, being released from the scope of the floating charge while yet remaining in the ownership of the company. If, as is currently the case, the fact of such a release is not published, an acquirer from a liquidator, an administrator or a receiver appointed by the holder of the floating charge cannot be confident of their title.

134. The subsection is not directed towards the escape of individual assets from the scope of the charge on the onerous or gratuitous transfer of the asset by the company to a third party prior to attachment of the floating charge. Unless or until the company goes into liquidation or a receiver is appointed, the company should be able to deal with its secured assets as normal by (say) selling them. It is not intended that normal business events of this kind should be registered as alterations. Accordingly, subsection (6) clarifies that, for the purposes of subsection (5), property is not to be regarded as released from the scope of a floating charge by reason only of its ceasing to be the property of the company which granted the charge.

Section 44 – Discharge of floating charges

135. This section is essentially permissive. Payment of the debt, or performance of the obligation, secured by the floating charge will normally discharge or extinguish the security and this is recognised in subsection (3). But it is useful to have a means whereby the Register of Floating Charges may be cleared of floating charges which have been so discharged or extinguished. There may also be instances in which, as part of a re-financing arrangement, it is desired to discharge an existing floating charge in favour of some other form of security and this section provides a ready, public means of achieving that.

Section 45 – Effect of floating charges on winding up

136. The essence of a floating charge is that until some event, such as the company going into liquidation or the appointment of a receiver, the security right is inchoate and the company may dispose (even gratuitously) of assets within the scope of the charge and the acquirer will obtain ownership unencumbered by any security right.

137. This section does a number of things. It repeats the existing law dealing with attachment, or crystallisation, of the floating charge on a winding up, when the floating charge is converted into a fixed security over the assets then within its scope.

138. It also provides in subsection (2) that if there is an insolvency in another EU state which is the company's centre of main interests that will trigger the crystallisation of a Scottish floating charge only if a notice is registered in the Register of Floating Charges.

139. It also clarifies that liquidation for the purposes of section 45 covers both the meaning within the Insolvency Act 1986 and, in the situation outlined in subsection (7)(a), the opening of "insolvency proceedings" within the meaning of Article 2(a) of the EC Regulation on insolvency proceedings (EC No 1346/2000).

140. A floating charge similarly attaches or crystallises on the appointment of a receiver or the delivery of a notice by an administrator. The relevant statutory provisions on receivership and administration are in the Insolvency Act 1986. They are not affected by these reforms. The priority of debts as provided for in section 176A of the Insolvency Act 1986 is also preserved. Going into liquidation within the meaning of section 247(2) of the Insolvency Act 1986 encompasses the insolvent liquidation of assets of an oversea company – see sections 220 and 221 of that Act.

Section 46 – Repeals, savings and transitional arrangements

141. Section 46(1) repeals Part XVIII of the Companies Act 1985 which is replaced by the new provisions on floating charges as set out in this Part. However, so that the new rules do not have retrospective effect, it is necessary to regard Part XVIII as still having effect in respect of all floating charges subsisting before the coming into force of these new rules (see subsections (2) and (3)). This will enable all matters relating to pre-commencement floating charges, such as the alteration of them, to be dealt with under the relevant pre-commencement provisions.

142. The new rules on creation of floating charges and ranking by date of creation will not disturb the priority of ranking of existing securities, whether fixed or floating, since they have all been created prior to the coming into force of the new rules. Holders of such securities will not be adversely affected by the creation of any new floating charge. In the interest of clarity, subsection (4) is intended to make plain that, for existing security rights, the pre-commencement rules of ranking continue in force.

143. Subsection (5) is consequential on the repeal of Part XVIII. Although it repeals section 140 of the Companies Act 1989, that section is to be treated as having effect for the purposes of subsections (3) and (4).

144. It should be noted that section 893 of the Companies Act 2006 provides the Secretary of State with a power to make provision for the effect of registration in the Register of Floating Charges and other similar registers.

Section 47 – Interpretation

145. This section defines "company" in a way which includes an oversea company. It also defines "fixed security" in terms based on and to the same effect as the definition in section 486 of the Companies Act 1985.

Related further provision

Section 48 – Formalities as to documents

146. The Requirements of Writing (Scotland) Act 1995 provides for a form of subscription of documents whereby the document has an evidential presumption of having been validly subscribed by the signatory. The 1995 Act provides that only documents having such "presumed authenticity" may be registered in *inter alia* the Register of Sasines. In practice, the same requirement is asked of documents presented to the Land Register. Section 48(1) applies the equivalent rule in the case of the Register of Floating Charges, which will facilitate a uniform treatment of applications to the Registers of Scotland when electronic conveyancing is introduced. Although not dealt with in this Act, section 222 (registration and execution of electronic standard securities) represents part of that electronic conveyancing system (see paragraph 842842 below.)

147. Subsections (2) and (3) are necessary to deal with the following situations: (a) where a document registered in the Register of Floating Charges has been annulled as a result of an application to the court for a decree of reduction; and (b) where something has been inaccurately expressed in a document registered in the Register of Floating Charges and, on application, the court has granted an order rectifying the defect. Although both may happen rarely, it is important that, as is already the law in relation to standard securities, a third party such as a person to whom a floating charge is being assigned should be able to rely on the Register. Accordingly, the effect of these provisions is that the decree of reduction or order of rectification will not affect the rights of the third party unless it has been duly registered in the Register of Floating Charges.

Section 49– Industrial and provident societies

148. The purpose of this section is to apply the recommended registration regime for floating charges by companies to floating charges in Scottish form granted by industrial and provident societies registered in Great Britain. Such charges are currently registered with the Financial Services Authority by virtue of section 4 of the Industrial and Provident Societies Act 1967, which is repealed.

Part 3 – Enforcement

Scottish Civil Enforcement Commission

Section 50 – Scottish Civil Enforcement Commission

149. Section 50(1) establishes a new corporate body to be known as the Scottish Civil Enforcement Commission. The Commission has to exercise its functions in accordance with any directions given to it by the Scottish Ministers. It also has to carry out its functions in a way which encourages equal opportunities and, in particular, compliance with the equal opportunity requirements.

150. Subsection (4) gives the Scottish Ministers power, by regulations, to confer functions on the Commission, take functions away from the Commission or to otherwise modify the functions of the Commission. Such regulations are subject to affirmative resolution procedure in the Scottish Parliament by virtue of section 224(4)(b)(i) of this Act.

"Functions" in this context includes powers and duties (by virtue of section 127 of the Scotland Act 1998 and paragraph 6(3) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (S.I. 1999/1379). Hence the ability of the Scottish Ministers to confer functions on the Commission allows them to impose duties on the Commission.

151. Subsection (5) provides that the regulations under subsection (4) may transfer a function conferred on another person (including the Scottish Ministers) by another enactment (such as a regulation or Act) to the Commission. Those regulations may also amend regulations or Acts as a consequence of transferring the function where this is considered necessary or expedient.

152. Subsection (6) abolishes the Advisory Council on Messengers-at-Arms and Sheriff Officers. The Advisory Council was established by Part V of the Debtors (Scotland) Act 1987 (the "1987 Act"), section 76, to advise the Court of Session on the making of Acts of Sederunt (that is to say court rules) to regulate the officer of court profession and generally to keep under review all matters relating to officers of court. Schedule 6 to this Act repeals Part V of the 1987 Act in its entirety since this Part, which deals with matters relating to the professions of sheriff officers and messengers-at-arms, such as their regulation, is replaced by Part 3 of this Act.

153. Subsection (7) introduces schedule 2 which makes general provision about the Commission.

Schedule 2 – the Scottish Civil Enforcement Commission (Introduced by Section 50)

154. Schedule 2 makes detailed provision concerning the status, governance, remuneration and other terms of appointment of Commissioners, and the general and disciplinary powers of the Commission. It also makes detailed provision in relation to various matters of an administrative nature.

155. Paragraph 1 makes it clear that the Commission is not to be regarded as a servant or agent of the Crown and that the Commission's property is not to be regarded as property of the Crown. This has legal implications in relation to immunities which are applied to servants or agents of the Crown and also in relation to particular statutory provisions which relate to Crown property.

156. Paragraph 2 deals with the membership of the Commission. It must be made up of a judge, a sheriff principal or sheriff, a lawyer, a judicial officer, 3 lay persons and 2 *ex-officio* members (the Lord Lyon King of Arms and the Keeper of the Registers of Scotland).

157. Paragraphs 3 to 14 deal with the tenure of each member and the procedure for filling vacancies in membership. By virtue of paragraph 3, serving MPs, MSPs and MEPs are ineligible for being appointed as members of the Commission. This rule also applies to those who have acted as such in the preceding 12 months. Paragraph 8 clarifies that a member of the Commission ceases to be a member if he or she becomes an MP, MSP or MEP.

158. Paragraph 10 gives the Scottish Ministers power to remove a member of the Commission from office where that member is unable or unfit to discharge the functions of a member or has not complied with the terms and conditions of office as set down by Ministers. This power could be used where, for example, a member of the Commission falls seriously ill and needs to be replaced.

159. Paragraphs 13 and 14 set out the procedure to be followed to fill vacancies in the Commission and paragraph 15 provides for a Commission chairperson to be selected from one of its members.

160. Paragraph 16 places a duty on the Commission to appoint a disciplinary committee. That committee will perform the disciplinary functions set out in section 71 and will make decisions under sections 68 and 72. Paragraph 17 provides for the determination by the Scottish Ministers of the remuneration and allowances for expenses which must be paid to Commission members by the Commission.

161. Paragraphs 18 to 20 set out the general powers of the Commission. The Commission has a wide power to do anything which it considers necessary or expedient for the purpose of carrying out its functions or in relation to its functions. In paragraph 19, several powers which are included in this general power are set out.

162. Paragraph 21 provides for the Commission to determine its quorum and that of the disciplinary committee and any other committee or sub-committee. By virtue of paragraph 22, the Scottish Ministers may make regulations (subject to negative procedure under section 224(3)) about the structure and procedures of the Commission.

163. Paragraphs 23 to 28 give the Commission the necessary powers to appoint and pay a chief executive officer and such other employees as it sees fit. These powers can be exercised only with the approval of the Scottish Ministers because the Commission, as a non-departmental public body, will be funded by the Scottish Executive as provided for by paragraphs 30 to 32. Those provide for the payment of grants and loans by the Scottish Ministers to the Commission. Any grant paid or loan made will be subject to terms and conditions that may be varied by the Scottish Ministers.

164. Paragraph 29 provides that the location of the Commission's offices must be approved by the Scottish Ministers. The Commission must also comply with any direction of the Scottish Ministers in this matter. This means that the Scottish Ministers can opt to relocate the Commission should they so wish.

165. Paragraph 30 provides for the Scottish Ministers to provide finance to the Commission by means of grants and loans.

166. Paragraphs 33 to 35 set out the duties incumbent on the Commission in respect of accounts and audit and provide for the Commission's financial year to run from 31 March of each year. Under paragraph 34, the Scottish Ministers can direct the Commission in relation to certain aspects of the statement of accounts which is required under paragraph 33(b).

Section 51 – Information and annual report

167. This section obliges the Commission to provide information relating to the carrying out of its functions to the Scottish Ministers and to prepare an annual report on its activities. The report should be prepared as soon as practicable after the end of the financial year to which the report relates.

168. Subsection (3) states that the report has to include a statement of accounts prepared according to the audit and account requirements specified in paragraphs 33 and 34 of schedule 2. The report may also contain a statistical analysis of the performance of judicial officers during the reporting period or any other period. The statistical information can be on both official functions, such as enforcement of court decrees and documents of debt by diligence, and on any other activities, such as informal debt collection, which officers undertake.

169. In preparing the report, the Commission has the power to require a judicial officer to provide information it thinks necessary for the preparation of the report (subsection (4)). Failure to provide information is considered to be "misconduct" under section 67(9) and can be dealt with under the powers given to the disciplinary committee in section 72.

170. Subsections (5) and (6) provide that the Commission must publish and send a copy of each report to the Scottish Ministers, who must lay a copy before the Scottish Parliament. The report may be published electronically by virtue of section 78(a).

Section 52 – Publication of guidance and other information

171. Section 52 provides that the Commission may, for the purposes of informing and educating the public, prepare and publish information and other material on its functions, the functions and activities (subject to section 56(1) which already deals with the publication of information and materials for the activity of informal debt collection) of judicial officers and the law of and procedures relating to diligence. Publishing can be by electronic means (section 78(a)). It can also carry out other such activities as it thinks fit with regard to informing and educating the public. Examples of such activities might include publicity campaigns, market research, school and college based activities and career promotion work.

Section 53 – Published information not to enable identification

172. Section 53 provides that the information contained in an annual report under section 51(2) or published under sections 52(1) or 56(1) must not be in a form which will enable identification of individual judicial officers or any persons who have had diligence executed against them. This means that such published information must not contain personal information, for example an officer's or other person's name or address.

Section 54 – Register of judicial officers

173. Section 54 provides that the Commission must keep a register of judicial officers. It may make rules as to the particulars and other information to be recorded in the register, regulate the procedure by which this will be provided by judicial officers and how changes in this information must be notified. The Commission must open the register to public inspection at reasonable times determined by the Commission.

Section 55 – Code of practice

174. Section 55 provides that the Commission must prepare and publish a code of practice relating to the exercise of the functions of judicial officers. It also enables the Commission to prepare and publish a code in relation to the undertaking of activities by judicial officers. This power is subject to section 56(2)(a) which already provides a power to publish a code of practice for the activity of informal debt collection. A code published under this section may, from time to time, be revised in whole or in part and any revised code must be published. Publishing can be effected electronically (section 78(a)). The Commission will send a copy of each code of practice to the professional association for judicial officers (see section 63) and the Scottish Ministers, who must lay a copy of it before the Scottish Parliament.

Section 56 – Publication of information relating to informal debt collection

175. In section 56, "informal debt collection" (as defined in subsection (4)) is the collection of debts, including debts which have not been established by court action, by means other than by formal diligence. This type of debt collection covers activities such as debt collection by letters, phone calls or personal visits. Informal debt collection for consumer debts such as credit card debts is already regulated by the Office of Fair Trading for the UK Government's reserved interest under the Consumer Credit Act 1974. Section 56 therefore covers informal debt collection relating to matters such as commercial debt and public debt, for example arrears of council tax. It provides that the Commission may publish information and other materials promoting good practice and informing the public about informal debt collection.

176. This information may be published as a code of practice or as guidance for persons carrying out informal debt collection (which could include judicial officers if rules under section 61(4) permit informal debt collection to be undertaken by them). A code published under this section may, from time to time, be revised and any revised code must be published and sent to the Scottish Ministers who will lay it before the Scottish

Parliament. By virtue of section 78(a), the information (including any code of practice) may be published electronically.

Judicial Officers

Section 57 – Judicial Officers

177. Section 57(1) creates the office of judicial officer and any person holding the office will have the functions (which include powers and duties) conferred on that office by the provisions of this Act (including any subordinate legislation made under powers contained in this Act) and by any other legislation.

178. A person may be granted a commission as a judicial officer by the Lord President only on the recommendation of the Commission provided the Commission is satisfied that the requirements set out in section 58(1) are met and that the person is a member of the professional association designated by the Scottish Ministers under section 63(1). The Commission must notify the applicant and the professional association where a commission is granted.

179. A judicial officer (unlike a sheriff officer) may carry out the functions of a judicial officer throughout Scotland (subsection (4)).

180. Subsection (5) provides that any person wishing to be a judicial officer must apply to the Commission unless the person is deemed to hold a commission as a judicial officer as a result of section 60(2). Under that section, messengers-at-arms and sheriff officers who hold a commission as such immediately before the day on which that section comes into force will automatically become judicial officers.

181. Subsection (6) provides for the process by which the Lord President may deprive an officer of his or her office. This will be done after the disciplinary committee of the Commission makes such a recommendation to the Lord President and once any time limit for appeal under section 74 has expired with no appeal having been made. The Lord President's decision is to be notified to the officer, the professional association, the Court of Session and every sheriff principal.

Section 58 – Appointment of judicial officer

182. Section 58(1) provides that the Commission must make a recommendation to the Lord President to grant an application for a commission as judicial officer where it is satisfied as to the suitability of the person. In taking a decision to make such a recommendation it must also take into account the overall number of judicial officers and any other matters it considers relevant. The person must be a member of the professional association (see section 63(3)). A copy of the decision on an application must be sent to the applicant (subsection (2)). Refusals to recommend the granting of a commission are subject to appeal as set out in section 74(1).

183. The Commission must, following the granting of a commission by the Lord President, issue an official identity card to the judicial officer (subsection (3)). The officer must, when requested, show the identity card when carrying out official duties (subsection (4)).

184. Subsection (5) provides that the Commission may make rules for the procedure for applications to become a judicial officer, the qualifications such a person must hold, the examinations and training to be undertaken before a commission may be granted and any other matters considered to be relevant to applications.

Section 59 – Annual fee

185. Section 59(1) provides that the Commission may make rules requiring every judicial officer to pay an annual fee to the Commission. These may include a specific date each

year by which payment must be made, how the annual fee is to be paid and any other matters the Commission considers to be appropriate (subsection (2)).

186. Subsection (3) provides that rules under this section must be approved by the Scottish Ministers.

Abolition of offices of messenger-at-arms and sheriff officer

Section 60 – Abolition of offices of messenger-at-arms and sheriff officer

187. Section 60(1) abolishes the offices of messenger-at-arms and sheriff officer. Messengers-at-arms are appointed by the Lord Lyon King of Arms on the recommendation of the Court of Session. Sheriff officers are commissioned on a territorial basis by the sheriff principal of each sheriffdom. Messengers-at-arms execute warrants issued by the Court of Session, the High Court of Justiciary and the Lyon Court. Messengers-at-arms have to be commissioned as sheriff officers before they can be appointed as messengers and are empowered to work across Scotland. Sheriff officers execute warrants of the sheriff court and are authorised to operate within the court area in which they have been granted a commission.

188. Subsection (2) provides that, from the day this section comes into force, those officers (provided they hold a commission as a messenger-at-arms or sheriff officer immediately before section 60(2) comes into force) will be deemed to hold a commission as a judicial officer granted under section 57(2).

189. Subsections (3) to (5) provide that it is competent for a judicial officer to carry out any function (which includes powers and duties) which was competent for a messenger-at-arms or sheriff officer to carry out (providing it does not conflict with any legislative provision about judicial officers) and references in any legislation to "messenger-at-arms", "sheriff officer" and "officer of court" are to be treated as if they are references to a judicial officer.

190. There are certain provisions in Acts in which the references set out in subsection (5)(a) to (c) are not to be read as references to judicial officers (for example, because the Act refers to the term "officer of court" in a context other than Scottish sheriff officers or messengers-at-arms). Subsection (6) specifies those provisions which are excluded from the effect of subsection (5).

Regulation of judicial officers

Section 61 – Regulation of judicial officers

191. Section 61(1) provides that the Scottish Ministers may, by regulations, confer functions on, or remove or modify the functions of, judicial officers. Again, functions in this context include powers and duties of judicial officers. Regulations made under this section are subject to negative resolution procedure before the Scottish Parliament as provided for by section 224(3).

192. Subsection (2) gives the Scottish Ministers further powers to make regulations. Those regulations may deal with the types of business association that officers may form (for example limited liability partnerships), provision about the ownership, membership, management and control of those associations, and conditions to be satisfied by those associations. Regulations made under this power are also subject to negative resolution procedure under section 224(3).

193. Subsection (2)(d) provides that the Scottish Ministers may make provision regulating the fees and charges that may be levied by judicial officers.

194. Subsection (3) requires the Scottish Ministers to consult the Commission before making regulations under subsection (1) or (2).

195. Subsection (4) gives the Commission the power to make rules regulating the conduct of judicial officers and prohibiting extra-official activities which are incompatible with their functions. Rules may permit extra-official activities which are not incompatible with officers' functions but may impose conditions on the carrying out of such activities. This rule-making power could be used to prescribe the kinds of permitted and prohibited extra-official activities which sheriff officers and messengers-at-arms were permitted to carry out. Permitted activities might include informal debt collection and prohibited extra-official activities might include being a money lender or an auctioneer with his or her own auction room. The rules may include a requirement on judicial officers to keep and audit accounts, maintain records for inspection, provide a bond of caution and other matters that the Commission considers appropriate.

196. Subsections (5) to (7) provide that no judicial officers may undertake allowable extra-official activities for payment without the consent of the Commission and the Commission may attach conditions to its consent. Subsection (5) requires an officer to obtain permission from the Commission to undertake remunerated activities which are not connected with the officer's functions. In practice, an officer will only be able to obtain permission for activities which are not already prohibited by rules made under section 61(4)(b) and will only need to obtain permission for activities which are not already permitted by rules made under section 61(4)(c). Permission to undertake extra-official activities for remuneration will be permitted only if the activity is not incompatible with judicial officer functions.

197. Subsection (7) provides that the Commission can attach conditions to any permission it grants and can also revoke permission it had previously granted if, for instance, it is considered that the activity has become incompatible with the officer's functions.

Section 62 – Duty to notify Commission of bankruptcy etc.

198. Section 62 provides that a judicial officer must notify the Commission in writing, within 28 days, of any one of the public acts of bankruptcy and related events listed in subsection (2). Most of the events listed apply to bankruptcies and insolvencies in Scotland. However, paragraph (e) (the making of a disqualification order under the Company Directors Disqualification Act 1986) applies on a UK-basis. Section 67(9)(d) provides that failure to notify is misconduct. Notification can be given electronically under section 78(b).

Judicial officers' professional association

Section 63 – Judicial officers' professional association

199. Section 63 gives the Scottish Ministers power to designate a professional association for judicial officers and to regulate the constitution and procedures of the professional association. Regulations under this section are subject to negative resolution procedure by virtue of section 224(3) and can be made only after consultation with the Commission, representatives of the professional association (or proposed association if one has yet to be designated) and any other body or person the Scottish Ministers consider has an interest. A commission as a judicial officer cannot be granted to anyone who is not a member of the professional association.

Section 64 – Duty of professional association to forward complaints to Commission

200. Section 64 provides that where the professional association receives a complaint about a judicial officer or the services provided by an officer, it must send details of that complaint and any evidence which accompanies it, to the Commission. This duty could activate where, for example, a member of the public upon whom diligence has been effected by a judicial officer complains about the manner in which the officer has carried out his or her functions.

Section 65 – Information from professional association

201. Section 65 provides that the Commission may require the professional association to provide any information to the Commission that it considers necessary to enable it to carry out its regulatory functions under sections 66, 67 and 71.

Investigation of judicial officers

Section 66 – Inspection of judicial officer

202. Section 66 provides that the Commission can appoint a person to inspect the work or a particular aspect of the work of a judicial officer. The person must, if required by the Commission, inquire into any paid activities undertaken by the judicial officer. The person appointed is required to prepare a report on the inspection for the Commission and is entitled to charge the Commission a fee unless the person is a civil servant working in that capacity. Whether or not the person is a civil servant, the person is entitled to reimbursement by the Commission of expenses reasonably incurred in the inspection.

Section 67 – Investigation of alleged misconduct by judicial officer

203. This section governs when the Commission can investigate allegations of misconduct by judicial officers. Subsection (1) provides that this section applies where—

- a person appointed under section 66 to carry out an inspection submits a report to the Commission disclosing that a judicial officer may have been guilty of misconduct;
- a sheriff or judge, but not the Lord President (who carries out functions relating to misconduct by depriving judicial officers of office by virtue of section 57(6)), makes a report to the Commission alleging misconduct;
- the professional association sends on details of a complaint under section 64;
- any other person complains to the Commission alleging misconduct of an officer; or
- the Commission otherwise has reason to believe that an officer may have been guilty of misconduct.

204. Subsection (2) provides that the Commission may disregard a complaint if it is considered that the complaint is frivolous or vexatious (i.e. is made simply to harass the judicial officer).

205. Subsections (3) and (4) provide that the Commission, after giving the officer an opportunity to admit, deny or give an explanation of the matter, may appoint a person to investigate the matter. Where a person was appointed under section 66 to inspect the work of the judicial officer, the Commission can appoint that person to carry out the investigation under this section (see subsection (8)). The Commission may not appoint a person if a judicial officer admits the misconduct in writing or gives a satisfactory explanation of the matter. An admission may be made by means of an electronic communication, as provided for in section 78(b).

206. Subsection (5) provides that the person appointed to investigate the alleged misconduct must provide a report to the Commission and may make a recommendation that the matter is referred to the disciplinary committee of the Commission where there is a probable case of misconduct with sufficient evidence to justify disciplinary proceedings.

207. Subsection (6) provides that the Commission must, where it receives such a recommendation, refer the matter to the disciplinary committee to be dealt with under section 71.

208. Subsection (7) provides that the Commission must pay the fees of the person conducting the investigation, except where the person is a civil servant acting in that capacity, and must pay the person's outlays (whether the person is a civil servant or not).

209. Subsection (9) defines "misconduct" as including bringing the office of judicial officer into disrepute, failure to provide information under section 51(4) and a failure to pay the annual fee to the Commission within 3 months of the due date. Failure to notify the Commission of public acts of bankruptcy and insolvent events as listed in section 62(2) is also misconduct which can be investigated by the Commission.

Section 68 – Suspension of judicial officer pending outcome of disciplinary or criminal proceedings

210. This section provides that the disciplinary committee may make an order suspending the officer from practice for a specific period where the Commission becomes aware of a complaint alleging misconduct on the part of a judicial officer, where the Commission becomes aware (under section 70) of a bankruptcy or related event involving the officer (or of other concerns surrounding such an event) or where a judicial officer has been charged with an offence.

211. The disciplinary committee may also extend the officer's suspension or revoke the order. Any decisions under this section are subject to appeal as set out in section 74(1).

Section 69 – Commission's duty in relation to offences or misconduct by judicial officer

212. Where the Commission becomes aware that a judicial officer has been convicted by a court of any offence or admits misconduct under section 67(4)(a), the Commission must refer the matter to the disciplinary committee to be dealt with under section 71.

213. Subsection (3) of section 69 specifies that "offence" means any offence which the judicial officer has been convicted of before or after being granted a commission as a judicial officer, other than any offence disclosed in his or her application for a commission. This is subject, however, to the Rehabilitation of Offenders Act 1974, so that a person applying for a commission as a judicial officer need not disclose spent convictions and a judicial officer cannot be suspended or deprived from office because of such spent convictions.

Section 70 – Commission's power in relation to judicial officer's bankruptcy etc.

214. Section 70 allows the Commission to make a referral to the disciplinary committee (to be dealt with under section 71) when it becomes aware of the occurrence of a public act of bankruptcy or related event as listed in section 62(2). The Commission can make such a referral only if it considers that the circumstances of the event give rise to concerns about the officer that the disciplinary committee could not otherwise consider because the circumstances and concerns do not constitute misconduct or a criminal offence. A public act of bankruptcy or a related event could be classified as misconduct if it entails conduct tending to bring the office of judicial officer into disrepute.

Disciplinary proceedings

Section 71 – Referrals to the disciplinary committee

215. Subsections (1) and (2) of section 71 provide that in dealing with any matter referred to the disciplinary committee, the committee must consider any report made to the Commission under section 67(5)(a) (report of investigation into alleged misconduct) and any other relevant information held by the Commission and may hold a hearing if it is considered appropriate. Where a judicial officer requests a hearing relating to a matter under consideration, the disciplinary committee must hold a hearing.

216. Subsections (3) and (4) provide that the disciplinary committee must, when holding a hearing, allow the judicial officer, the person who carried out any investigation under section 67 and any other person the committee thinks appropriate, to make a statement orally or in writing and to lead or produce evidence.

217. Subsections (5) and (7) provide that the disciplinary committee may award expenses in any hearing in favour of or against the judicial officer to whom the hearing relates. Expenses awarded in favour of the judicial officer will be paid by the Commission while expenses awarded against the officer will be paid to the Commission by the officer.

218. The Commission may (under subsection (8)) make rules as to the procedures, including the procedures to be followed during a hearing, of the disciplinary committee.

219. Subsection (9) provides that any rules made under subsection (8) must be approved by the Scottish Ministers.

Section 72 – Disciplinary committee's powers

220. Section 72 covers the situation where, after dealing with a matter referred to it, the disciplinary committee is satisfied that it is appropriate to take further action.

221. Where the judicial officer is guilty of misconduct (as defined in section 67(9)), the disciplinary committee can suspend the officer or recommend that the Lord President deprive the officer of office, it can censure the officer, it can restrict the officer's functions or activities or it can impose a fine. If the officer is guilty of charging excessive fees, the committee can also require the officer to pay back the excessive amounts (with interest).

222. Where the matter reported to the disciplinary committee is one to which section 70 applies (concerns about an officer, falling short of misconduct and not constituting an offence, which arise from a public act of bankruptcy or related event as set out in section 62(2)), the committee may make an order to either suspend the officer from practice or recommend that the Lord President deprive the officer of office or it may make an order restricting the functions or activities of the officer.

223. Where the judicial officer is convicted of an offence (including an offence related to a public act of bankruptcy or related event as set out in section 62(2)), the committee may make an order either suspending the officer or recommending that the Lord President deprive the officer of office, an order censuring the officer or an order restricting the officer's functions or activities.

224. Subsection (6) provides that where an officer fails to comply with an order imposing a fine, the disciplinary committee may suspend the officer from practice for a specified time or recommend that the Lord President deprive the officer of office.

225. Decisions under this section are subject to appeal as set out in section 74(1). A copy of any decision made by the disciplinary committee must be sent to the officer to whom it relates (see subsection (7)).

Section 73 – Orders under sections 68 and 72: supplementary provision

226. Section 73 provides that an order imposing a fine is enforceable as if it were an extract decree arbitral bearing a warrant for execution issued by the sheriff. This means the Commission may recover any fine imposed by the order by means of diligence against the judicial officer. The Commission must also notify any order made by the disciplinary committee to the Court of Session, every sheriff principal and the professional association except for an order recommending that the Lord President deprives the officer of office.

Appeals

Section 74 – Appeals from decisions under sections 58, 68 and 72

227. Section 74 provides that appeals against decisions of the Commission and the disciplinary committee may be made to the Inner House of the Court of Session. The decisions which may be appealed are decisions of the Commission not to recommend that the Lord President grants a person a commission as a judicial officer (section 58(1)), orders of the disciplinary committee suspending the officer from practice pending the outcome of disciplinary or criminal proceedings or extending such a suspension (section 68) and orders made under section 72 suspending an officer, recommending an officer be deprived of office, censuring an officer, restricting an officer's functions or activities, imposing a fine on an officer or requiring an officer to repay fees and outlays. The decision of the Inner House on an appeal is final. Procedures relating to appeals are to be prescribed by Court of Session rules.

Miscellaneous

Section 75 – Judicial officer's actions void where officer has interest

228. Section 75 specifies the conditions under which a judicial officer who has a particular kind of interest may not exercise his or her functions. This covers individual interest as well as circumstances where a debt is owed to or by a business associate or family member of the judicial officer. Any action by the officer in relation to such cases is void which means that it is a nullity. The prohibition on acting covered by this section relates to "prescribed functions", which are the functions of judicial officers which the Scottish Ministers specify, by regulations, for the purposes of this section (see subsection (7)).

229. Subsection (4) (read with subsection (6)) defines, for the purposes of this section, who is a business associate of the judicial officer and what is meant by the officer having a "controlling interest" in a company or firm.

230. Subsection (5) sets out the list of family members to whom a debt might be due, or who might owe a debt, in relation to which any action by a judicial officer, which is a prescribed function, would be void under this provision. Family members, for the purposes of this section, include a co-habitee of an officer where they are living together as husband and wife and same sex co-habitees living together in a relationship akin to a relationship between husband and wife except that the officer and the person are of the same sex.

Section 76 – Measure of damages payable by judicial officer for negligence or other fault

231. This section replicates the provisions of section 85 of the 1987 Act, which is now repealed (see schedule 6). It makes it clear that no common law rule which determined the damages payable to a creditor by a messenger-at-arms or sheriff officer for negligent delay or failure to execute diligence by reference to the amount of debt being recovered is revived as a result of that repeal or the provisions in this Part. Nor is any such rule applied to a judicial officer. The effect of this is that the normal rules for quantifying damages for negligence or breach of contract apply.

Section 77 – Effect of code of practice

232. Section 77(1) provides that a judicial officer must exercise that officer's functions and undertake that officer's activities with regard to any code of practice published by the Commission under section 55 or 56.

233. Subsection (2) provides that failure to comply with a code of practice in itself will not cause a judicial officer to be prosecuted or liable to any civil proceedings.

234. Subsections (3) and (4) provide that a code of practice will, however, be allowed as evidence in any criminal or civil proceedings. Where a court or tribunal conducting civil or criminal proceedings, or the disciplinary committee of the Commission holding a hearing, considers a code of practice to be relevant to any question arising in the proceedings, the code can be taken into account when determining that question.

Section 78 – Electronic publications and communications

235. Section 78 clarifies that references to publishing and notification, admission or representation "in writing" includes doing all of these things by electronic means and by use of electronic communications (defined in section 221).

Part 4 – Land Attachment and Residual Attachment

Chapter 1 – Abolition of adjudication for debt

Section 79 – Abolition of adjudication for debt

236. Adjudication for debt is the diligence which creditors may use against heritable (and some other) property of debtors. A creditor who has, say, decree for payment, and who wants to recover that money by diligence against that kind of property must first raise an action of adjudication. Decree in that action gives the creditor some rights over the debtor's property (such as the ability to remove the debtor from possession and to let the property). However, if the debt is not paid off, a 10-year period (the "legal") must expire before the creditor can take the next step, raising an action for declarator of expiry of the legal. Decree in that action has the effect of transferring ownership of the property to the creditor.

237. This section abolishes adjudication for debt. That abolition does not affect an action raised before the day this section comes into force provided decree is granted no later than 6 months after that day.

Section 80 – Renaming of the Register of Inhibitions and Adjudications

238. This section provides that, following from the abolition of adjudication for debt, the Register of Inhibitions and Adjudication is renamed the Register of Inhibitions. That register has had several titles over the years and various enactments make reference to it by those titles. Subsection (2) provides that all references in those enactments to the Register of Inhibitions and Adjudications, the General Register of Inhibitions or the Register of Adjudication are to be read as references to the Register of Inhibitions.

239. Adjudication in security (which is available to a creditor seeking to enforce a future or contingent debt) is abolished by section 172 of the Act (see paragraph 512512 below).

Chapter 2 – Attachment of land

Land attachment

Section 81 – Land attachment

240. Section 81 creates a new diligence over land to be known as land attachment.

241. Subsection (2) provides that land attachment is competent only if the debt is established by a decree or document of debt, the debtor has been charged to pay the debt and the period for payment has expired without payment being made. It also provides that, where the debtor is an individual, the creditor must provide the debtor with the debt advice and information package within the 12 weeks before registering the notice of land attachment. "Decree" and "document of debt" are defined in section 128. The debt advice and information package is the same package required, in the case of attachment of moveables, by section 10 of the 2002 Act (see subsection (8)).

242. Subsection (3) provides that a land attachment is created over land at the beginning of the day which falls 28 days after the last day on which a notice of land attachment is registered. The reference to the "last day" is necessary because the notice must be registered in both the property register and the personal register and may therefore be registered in one before being registered in the other. The period between registration of the notice and creation of the land attachment gives third parties notice that the attachment, which may affect a deed granted by the debtor, is pending. It covers a "registration gap", similar to that discussed in respect of sequestration in paragraph 70 above, when a notice of land attachment has been sent for registration but a person dealing with the debtor will not be aware of it because it has yet to appear on any register.

243. Subsection (3) should be read together with the provision in sections 83(6) and 121(1). Under section 83(6), the notice of land attachment is void and no land attachment will be created if the creditor does not register a certificate of service of the notice within the 28-day period. Section 121(1) provides that the notice of land attachment ceases to have effect and, accordingly, no land attachment will be created if the debt is paid, or tendered to, the creditor or others on the creditor's behalf within that period.

244. Subsection (4) provides for the effect of a notice of land attachment during the period after it is registered and before the land attachment is created. The notice has effect as if it were an inhibition registered against the debtor in the Register of Inhibitions but restricted to the land described in the notice.

245. Subsection (5) provides for the effect of a land attachment. It gives the creditor a subordinate real right over the land described in the notice of land attachment as security for the "sum recoverable by the land attachment". That sum is the sum (principal and accrued interest) for payment of which the charge was served together with any interest which may be accrued before the debt is paid plus all expenses of the land attachment which are chargeable against the debtor.

246. Subsection (7) gives the Scottish Ministers power, by regulations, to change the 28-day period. This power extends to amending any Act in which that period is mentioned (see, for instance, new section 13A being inserted into the Conveyancing and Feudal Reform (Scotland) Act 1970 by section 85). Any such regulations will be subject to negative resolution procedure (see section 224(3)).

Section 82 – Attachable land

247. Section 82(1) defines what is meant by "land" in this Chapter and, therefore, the property of the debtor which may be attached by land attachment. This is land which is either owned by the debtor or is the right of long lease of land in relation to which the debtor is the tenant.

248. Subsection (2) provides that such land or long lease is attachable only if the debtor has a recorded or registered title to the land or lease. That subsection also excludes proper liferents.

249. In addition, by virtue of subsections (2) and (3), long leases which are not assignable cannot be attached by land attachment. A long lease which is assignable but only with the consent of the landlord is not to be regarded as unassignable and can be attached. Only leases which are not assignable under any circumstances may not be attached by land attachment.

250. "Land" is used throughout this Chapter of this Act (rather than "land or, as the case may be, long lease" but that needs to be read with section 128(2), which modifies such references (including references to ownership, purchase, sale, conveyance and disposition) so that they include references to, for instance, the right of long lease and to assignation.

Section 83 – Notice of land attachment

251. Section 83(1) provides that a notice of land attachment must be in the form prescribed in rules of court and provide a description of the attached land. The description needed will depend on the requirements of the property register within which the notice is the be registered. To be effective, the notice must also be registered in both the relevant property register (either the Register of Sasines or the Land Register – see section 128) and in the Register of Inhibitions.

252. Subsections (2) and (3) provide that a creditor can register a notice of land attachment only where the sum which the creditor has charged the debtor to pay is more than £3,000, or any other sum which the Scottish Ministers prescribe. The power to change this sum is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).

253. Subsection (4) provides that it is competent to register a single notice of land attachment in relation to two or more sums which the debtor has been charged to pay.

254. Subsection (5) specifies that the notice of land attachment must be served by a judicial officer on the debtor, any person (other than the debtor) who owns the land and any tenant under a long lease of the land, as soon as is practicable after the notice is registered.

255. Subsection (6) provides that if the certificate of service on the debtor is not registered before the 28-day period expires, the notice will be, and will be deemed always to have been, void. Accordingly, no land attachment will be created. Subsection (7) provides for the certificate of service to be in a form prescribed in rules of court and to contain a description of the land to be attached and to be registered in the same way as the notice of land attachment.

Consequences of land attachment

Section 84 – Debts secured by land attachment not rendered heritable

256. Section 84 specifies that the creation of a land attachment will not make a moveable debt heritable, which avoids (for example) any affect on rights of succession. This is particularly relevant, if the creditor dies while the land attachment still has effect, in succession to the creditor's estate.

Section 85 – Restriction on priority of ranking of certain securities

257. This section inserts a new section 13A into the Conveyancing and Feudal Reform (Scotland) Act 1970 (the "1970 Act").

New section 13A – Effect of subsequent land attachment on ranking of standard securities

258. Section 13(1) of the 1970 Act covers the preference in ranking of standard securities. Where a creditor has registered a standard security over land, and another creditor subsequently registers a standard security over the same land, the first creditor's preference in ranking is restricted to security for present advances and those future advances which that creditor is obliged to make.

259. Section 13A applies this rule where, instead of a subsequent standard security being registered, a land attachment is created over the same land. That subsequent land attachment, being a real right in security over the land, will have effect on the existing security in the same way as a subsequent standard security. Section 13A provides that it has this effect from the day on which the land attachment is created, provided notice is given to the existing secured creditor of the registration of the notice of land attachment before the expiry of the 28-day period.

Section 86 – Lease granted after registration of notice of land attachment

260. This section applies where a notice of land attachment is registered and where, during the 28-day period mentioned in section 81(3), the debtor or a tenant of the debtor grants a lease (or sublease) of land specified in the notice. Where a land attachment is created at the end of that period, any such lease which would be reducible were it granted in breach of an inhibition (for which see section 163) is reducible by the creditor.

Section 87 – Assignation of title deeds etc.

261. Section 87(1) provides that a land attachment has the effect of assigning the title deeds, searches and all unregistered conveyances affecting the attached land to the creditor. Subsection (2) entitles the creditor, where the land is sold by virtue of the land attachment, to deliver those title deeds and other documents to the purchaser and to assign to that purchaser any right the creditor has to have any title deeds not in the creditor's possession delivered to the creditor. This mirrors the effect of section 10(4) of the 1970 Act (which operates in a similar way when a creditor registers a standard security).

Section 88 – Acquisition of right to execute land attachment

262. Section 88 of the 1987 Act provides for how diligence may be done where a decree or document of debt is assigned to (or otherwise acquired by) a person who is not the original creditor (for ease of reference, called here the "assignee"). The assignee must apply to the court for warrant authorising the assignee to do any diligence authorised by the original decree or other document.

263. Section 88 of this Act provides for how such assignation or other acquisition affects land attachment. The assignee may take, or continue to take, steps towards enforcing the debt by land attachment provided that (a) before the assignation or other acquisition, a notice of land attachment has been registered; and (b) before taking those steps, the assignee registers a notice in the relevant property register and the Register of Inhibitions. If the assignee so registers notice, the assignee is treated as having been granted a warrant under section 88(4) of the 1987 Act. The notice must be in the form prescribed in rules of court.

Section 89 – Effect of debtor's death before land attachment created

264. Section 89(1) applies where a debtor dies after a creditor has taken steps to begin or carry out a land attachment but before a land attachment has been created. Section 90 covers the case where a debtor dies after a land attachment is created.

265. The basic position, as set out in subsection (2), is that any steps taken cease to have effect and the charge served on the debtor becomes void.

266. Subsection (3) provides that nothing in subsection (2) stops the creditor from proceeding to raise, against any executor of the debtor, an action to constitute the debt against the debtor's estate.

267. Subsection (4) provides that any warrant for diligence in such an action authorises land attachment.

Section 90 – Effect of debtor's death after land attachment created

268. Section 90(1) clarifies and applies the existing law on the effect of the death of a debtor on subordinate real rights over his or her land. Where a debtor dies after a land attachment has been created, the land attachment will continue to have effect.

269. Subsection (2) gives the Court of Session power, by rules of court, to modify the procedures under this Chapter to reflect that the debtor is dead and that the land attachment is proceeding. Provisions about the service of notices of applications for

warrant for sale and for foreclosure which require the creditor to serve or intimate such applications to the debtor will require to be modified, as will other procedures.

Section 91 – Caveat by purchaser under missives

270. A person who has entered into a contract to purchase land from a debtor, but to whom ownership of that land has not yet been transferred, may be concerned that a creditor of the debtor will execute a land attachment affecting that land. Section 91 provides a mechanism under which that person will be informed, if such a land attachment is created, of any attempt by the attaching creditor to sell that land.

271. Subsection (2) provides that such a person may register a notice in the Register of Inhibitions, in the form prescribed in rules of court, for the purpose of receiving intimation of an application under section 92(1) for a warrant for sale of the land. Under section 92(4)(c)(ii), the attaching creditor must carry out a search in that register and must intimate the application to any person who has registered a notice under this section (see section 92(5)(b)). The person who registered the notice may then lodge objections to the application (see section 92(6)) and, subject to sections 99 and 100, may be able to complete title to the land.

Preparations for sale of attached land

Section 92 – Application for warrant to sell attached land

272. Section 92 provides for the form and method of applying for a warrant to sell attached land.

273. A creditor may apply for warrant to sell attached land only where a land attachment is in effect, 6 months have elapsed since the notice of land attachment was registered, the sum recoverable by the land attachment at that time exceeds £3,000 (or another sum prescribed by the Scottish Ministers) and that sum has not been paid off. The power to change this sum is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).

274. Under subsection (2), the Scottish Ministers have power to restrict the creditor's right to apply under subsection (1) for a warrant for sale. They can do this by excluding either all dwellinghouses or dwellinghouses of a specified kind from land in relation to which such an application may be made. Such dwellinghouses could still be attached by land attachment but the attaching creditor could not apply to have them sold. This power is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).

275. The application must, among other things, name a solicitor who is willing to act as the "appointed person" (see sections 97(2)(b) and 108) and to sell the land if warrant is granted. Subsection (4) covers the form and content of the application and the documents which are to accompany it, including reports on the searches in the property register and the Register of Inhibitions. Subsection (5) provides for the persons to whom the application must be intimated.

276. Under subsection (6), any person who receives intimation of the application is entitled to object to it but must lodge objections within 14 days of receiving the application.

277. Under subsection (7), the Scottish Ministers may by regulations make further provision about the reports on searches that accompany an application for a warrant to sell attached land. Such regulations are subject to negative resolution procedure (see section 224(3)).

278. Subsection (8) provides for the use of electronic communications. In particular, the application must be accompanied by a declaration signed by the solicitor who the creditor proposes as the appointed person. Where that declaration is an electronic

communication, the signature must be a certified electronic signature (as defined in section 221).

Section 93 – Notice to local authority of application for warrant for sale

279. This section provides that a creditor, other than a local authority, who applies for a warrant to sell attached land which comprises or includes a dwellinghouse, must notify the local authority in whose area the dwellinghouse is situated. The notification must be given in the form and manner prescribed under section 11(3) of the Homelessness etc. (Scotland) Act 2003.

Section 94 – Preliminary hearing on application for warrant to sell

280. Section 94 requires the sheriff to hold a preliminary hearing which the creditor must attend and at which the persons to whom intimation of the application was given under section 92(5) are to be given the opportunity of making representations.

281. If satisfied that the application is in order, the sheriff must fix a date for a full hearing on the application. In addition, the sheriff must, among other things, appoint a surveyor or other suitably qualified person to report on the open market value of the land and, where the creditor has been unable to ascertain the amount outstanding under any security or other diligence affecting the land, require any such security or diligence holder to disclose those amounts.

Section 95 – Valuation report

282. Section 95(1) authorises the valuer, appointed under section 94(3)(c), to take all necessary steps to produce a valuation report which must be sent to the creditor and the persons to whom the application for the warrant for sale was intimated.

283. Subsection (2) provides that the debtor and any other person occupying the land must allow the valuer to inspect the land and carry out all necessary steps to produce the valuation report.

284. Subsections (3) and (4) provide that the creditor is liable to the valuer for the costs associated with the production of the report. These will be expenses of the land attachment and (under section 120) will be chargeable against (and therefore recoverable by the creditor from) the debtor.

Section 96 – Creditor's duties prior to full hearing on application for warrant for sale

285. Section 96(1) requires the creditor, at least 7 days before the date of the full hearing under section 97, to lodge the valuation report, a continuation of the reports on the searches in the property register (lodged with the initial application for warrant for sale) and in the Register of Inhibitions, and a note of any amounts outstanding under any securities or diligences affecting the land.

286. Subsection (2) provides for further intimation of the application and the date of the full hearing where a search in the property registers reveals a deed or a search in the Register of Inhibitions reveals a notice registered since the date of application. The sheriff, if it appears necessary, may postpone the date of the hearing and the creditor will be required to inform the debtor and other relevant persons of the later date. A person who receives intimation of the full hearing under this section may lodge objections (see subsection (4)).

287. A sheriff who postpones a full hearing following an application can make whatever ancillary orders he or she thinks appropriate (see subsection (3)). This can include ordering fresh continuations of the reports on searches in the property registers and in the Register of Inhibitions.

288. Subsection (5) provides that the Scottish Ministers may by regulations make further provision about the continuations of the reports on searches in property registers and in the Register of Inhibitions that an attaching creditor must lodge with the court. Such regulations are subject to negative resolution procedure (see section 224(3)).

Section 97 – Full hearing on application for warrant for sale

289. Section 97(1) provides that, at the hearing on an application for warrant to sell attached land, the sheriff must not make any order without first giving any person who has lodged objections under section 92(6) an opportunity to be heard.

290. Under subsection (2), the sheriff may grant the application provided he or she is satisfied that the application is in order. This discretion is subject, however, to a number of other provisions in the Act, namely subsections (3) and (5) of this section and sections 98 (warrant for sale of dwellinghouses), 99 (protections for purchasers under missives) and 102 (land owned in common).

291. Where the sheriff grants the application, the sheriff must grant warrant for sale of the attached land and must appoint a solicitor (either the solicitor specified in the application or another of the sheriff's choosing) as the appointed person.

292. Subsection (3) provides that the sheriff may, if satisfied that granting the warrant for sale is unduly harsh to the debtor or any other interested person, either refuse the application or grant it and suspend the warrant for a period up to one year.

293. Subsection (4) provides that, where the sheriff grants warrant for sale, the sheriff must specify a time within which the land must be sold, may limit the warrant to part only of the attached land, and may authorise the sale of the attached land by lots.

294. Under subsection (5), the sheriff must refuse the application if satisfied that any of the grounds specified in subsection (6) apply. Those grounds include the ground that, if the attached land were sold, the "net likely proceeds" would not exceed the aggregate of the expenses of the land attachment and either £1,000 or 10 per cent of the outstanding debt (whichever is the lesser). The Scottish Ministers are given power by subsection (7) to alter the figure of £1,000 and the percentage of 10 per cent. That power is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)). Subsection (8) defines "net likely proceeds" as the proceeds of sale less any sums due to other creditors who rank before or equally with the attaching creditor.

Section 98 – Application for warrant for sale of sole or main residence

295. Section 98(1) applies where the creditor applies for a warrant for sale of attached land which is or includes a dwellinghouse which is the sole or main residence of the debtor, of the owner (if that person is not the debtor) or of any of the persons specified in subsection (2).

296. Those persons are a non-entitled spouse of the debtor or owner, a cohabitee of the debtor or owner, a civil partner of the debtor or owner, a same sex cohabitee of the debtor or owner, and a former partner of the debtor or owner who resides with a child, provided that the child is also a child of the debtor or owner, and that former partner lived with the debtor or owner as husband and wife (or with the characteristics of that relationship) throughout a period of 6 months ending on the day on which the debtor or owner ceased to reside in the dwellinghouse.

297. The sheriff is not prohibited from granting a warrant for sale of a dwellinghouse where this section applies but, before making a decision, the sheriff is obliged by subsection (4) to consider the matters in subsection (5). Those matters are the nature and reasons for the debt secured by the land attachment, the debtor's ability to pay, any action taken by the creditor to help the debtor in paying the debt and the ability of those living in the property to obtain reasonable alternative accommodation.

298. Subsection (6) allows the Scottish Ministers to modify the matters listed in subsection (5) which the sheriff has to consider. That power is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).

299. Subsection (7) provides that, where the sheriff grants warrant for sale, the sheriff can suspend the operation of the warrant for a period not exceeding 1 year.

300. Subsection (8) provides that a dwellinghouse may be a sole or main residence even if it is also used by the debtor or other relevant person for the purposes of any profession, trade or business. Subsection (9) defines what is meant by "child", "dwellinghouse" and "non-entitled spouse".

Section 99 – Protection of purchaser under contract where creditor applies for warrant for sale

301. Sections 99 to 101 deal with the situation where the debtor has concluded a contract to transfer attached land to a third party (called in those sections the "prospective purchaser").

302. Section 99 applies where a creditor applies for a warrant to sell attached land and a person who has registered a caveat under section 91 has lodged objections to the application.

303. Subsections (2) and (3) provide that the sheriff may, if satisfied the prospective purchaser did not seek to defeat the rights of creditors of the debtor in entering into the contract and that both the purchaser and debtor will proceed quickly with the purchase, make an order suspending the application (i.e. without making a decision on whether or not to grant warrant for sale) and requiring the prospective purchaser to pay the price due under the contract to the creditor.

304. Subsection (4) provides that section 116 applies to the proceeds of sale paid to the creditor under this section as if the sale had taken place under a warrant for sale and those proceeds were the proceeds of that sale.

Section 100 – Protection of purchaser under contract where warrant for sale granted

305. This section applies where a prospective purchaser had (before notice of land attachment was registered) entered into a contract to buy attached land from the debtor and a warrant for sale is subsequently granted.

306. Subsection (2) operates in a similar way to section 99(2) and (3) and provides that the sheriff may make an order suspending the warrant for a period of up to 1 year and requiring the prospective purchaser to pay the price under the contract to the appointed person.

307. Subsection (3) operates in a similar way to section 99(4).

Section 101 – Provision supplementary to sections 99 and 100

308. This section applies where an order is made under section 99(2) or 100(2) and gives the sheriff power, on an application by the creditor or the appointed person, to revoke the order. The sheriff may do so if satisfied that the prospective purchaser and the debtor entered into the contract to defeat the rights of creditors of the debtor or if there has been undue delay in completing the sale.

Section 102 – Warrant for sale of attached land owned in common

309. Section 102 applies where the land specified in an application for warrant to sell attached land is owned in common by the debtor and another person or persons. Land owned in common may be capable of being separated into part owned by the debtor

and part owned by the co-owner. Where this is possible, the debtor's part may be sold. Where this is not possible, the whole land would have to be sold and the proceeds of sale divided, with the debtor's share going to pay the sum recoverable by the land attachment and the co-owner's share being paid to that co-owner.

310. Subsection (2) provides that, subject to subsection (3), the sheriff may make an order under section 97(2) granting warrant for sale of the land owned in common.

311. Subsection (3) provides that the sheriff must specify in the order whether the warrant authorises the division of the land owned in common and the sale only of the part belonging to the debtor or sale of all the land owned in common and, subject to subsection (5), division of the proceeds.

312. Subsection (4) provides that, where the warrant authorises division of the land, from the day on which the order granting the warrant is made the debtor's part will be subject to the land attachment and the remaining land will be released from it. The warrant will apply as if the land specified in it were the debtor's part and the warrant for sale granted were warrant for sale of that part.

313. Subsection (5) provides that, where the warrant authorises the sale of the land owned in common and a division of the proceeds, the appointed person must pay the other owner of the land the share of the proceeds of sale due to that owner and deal, as specified in section 116, with the share of proceeds that would be due to the debtor. The appointed person's duty to pay to the common owner the common owner's share of the proceeds is subject to the rights of any creditor with a security over the third party's interest in the land.

314. Subsections (6) and (7) make further provision providing that a common owner of common property may buy out the attached property and sets out the amount payable to the appointed person by such an owner if the whole land is bought by that owner and the proceeds fall to be divided.

Section 103 – Intimation of sheriff's decision at full hearing

315. Section 103(1) provides that, where a warrant for sale is granted under section 97(2), the creditor must send a copy of the warrant to the debtor and the appointed person.

316. Subsection (2) provides that, where a warrant is refused under section 97(3)(b) or (5), the sheriff clerk must send a copy of the order to the debtor and to any other person the sheriff clerk considers to have an interest.

Section 104 – Supplementary orders as respects sale

317. Section 104(1) gives the sheriff power, when either granting an application for warrant for sale or subsequently, to make any order in connection with the sale that appears to the sheriff to be appropriate. Subsection (2) provides that, in particular, on application by the appointed person, the sheriff may extend the period within which the land is to be sold or may remove that appointed person and appoint another solicitor as appointed person instead. The debtor, a creditor or any other interested party may make an application for the removal of the appointed person and the appointment of a replacement one.

318. Subsection (3) provides for the intimation, by the creditor, of orders made under subsection (1) after the granting of warrant for sale.

Section 105 – Effect of certain refusals of application for warrant for sale under section 97(5)

319. This section provides that, where an application for sale is refused on a ground specified in paragraph (d), (e), (f) or (g) of section 97(6), the land attachment will not, because

of that refusal, cease to have effect and it will be competent for the creditor to make a further application for a warrant to sell the attached land.

Section 106 – Termination of debtor's right to occupy land

320. Section 106 provides the creditor with power to terminate the right of the debtor or other person having a right derived from the debtor to occupy land in respect of which warrant for sale has been granted.

321. This is achieved by the creditor serving a notice (which complies with subsection (2)) on the debtor or that other person. The right of the debtor or other person to occupy the land is terminated with effect from the day specified in the notice, which must be a minimum of 7 days after the date of service. A certificate of service of the notice in the form prescribed in rules of court may be registered.

322. Subsection (3) provides that where a person (other than the debtor) has a right to occupy the land which, leaving out of account the registration of the notice of land attachment, would have been good against a singular successor of the debtor, that person's right cannot be terminated by notice under this section.

Section 107 – Consequences of giving notice under section 106(1)

323. Section 107 governs the consequences of serving notice under section 106.

324. Subsection (1) provides that, from the date the creditor serves notice under section 106, the creditor has the rights and obligations of a heritable creditor in lawful possession of the land. This is similar to section 20(5) of the Conveyancing and Feudal Reform (Scotland) Act 1970, which applies where a creditor under a standard security has obtained lawful possession of the security subjects on the default of the debtor. Subsection (2) provides that the rights and obligations in subsection (1) include any right the debtor, or other person whose right to occupy has been terminated under section 106, has to receive rent from a tenant. The creditor has that right only in relation to rent due on or after the date on which the creditor notifies the tenant of the termination of the debtor's (or other person's) rights, either in writing or by electronic means (see subsections (3) and (6)). The creditor also has right to any lease, and any permission or right of occupancy. The creditor does not, however, have power to grant a lease.

325. Subsection (4) gives the creditor power to apply to the sheriff for an order authorising reconstruction, alteration or improvement works if they are required to maintain the market value of the land. The creditor may also bring an action of ejection against the debtor and will have title to bring any action of removing, intrusion or ejection which the debtor might have brought in respect of the land. The costs of works needed to maintain the market value of the land and of any action brought under subsection (4) will be expenses of the land attachment recoverable from the debtor (see subsection (5))

The sale

Section 108 – Appointed person

326. Section 108 makes provision about the appointed person and that person's functions (the main function being to carry out the sale of the attached land under the warrant).

327. Subsection (1) provides that the appointed person is an officer of the court and must act independently of the creditor, debtor and any other interested person. Subsection (2) requires the appointed person to lodge a bond of caution before exercising any functions under this Chapter.

328. Subsection (3) provides that the appointed person may apply to the sheriff who granted the warrant for sale for directions as to how to perform any of the appointed person's functions.

329. Subsection (5) provides that the appointed person is liable to the creditor, debtor, any person who owns the attached land in common with the debtor and any secured creditor for patrimonial loss as a result of negligence on the part of the appointed person in executing the warrant for sale. Subsections (6) and (7) provide that the creditor is liable for the appointed person's expenses and outlays incurred in exercising that person's functions, but that those expenses are expenses of the land attachment and the creditor can recover them from the debtor.

330. Subsection (8) gives the Scottish Ministers power to make further provision about the functions of the appointed person. This power is exercisable by regulations subject to negative resolution procedure (see section 224(3)).

Section 109 – Method of sale

331. Section 109 provides for the appointed person's main function – selling the attached land. Subsection (3) requires the appointed person to consult the creditor about the method of sale (private bargain or public auction) which is to be used. Subsection (4) requires the appointed person to advertise the land for sale and ensure the best price is obtained.

Section 110 – Legal incapacity or disability of debtor not to affect title of purchaser

332. The effect of this section is that a purchaser who buys the land sold in execution of the warrant for sale can get a good title to the land without being adversely affected by any legal incapacity or disability affecting the debtor (such as the debtor being not of full age).

Section 111 – Title of purchaser not to be affected by certain irregularities

333. This section provides protection for purchasers who buy land sold under warrant for sale provided they acted in good faith when buying the land and provided a certificate in the form prescribed in rules of court has been granted by the appointed person confirming the land attachment was properly carried out. The validity of a disposition which is registered by such a purchaser will not be challengeable on the ground that the land attachment was not carried out properly or that it was no longer in force when the sale took place.

Section 112 – Effect of registration of disposition on securities

334. This section provides that, where a disposition of attached land is granted to a purchaser and registered, the land will no longer be subject to the land attachment or to any heritable security or diligence ranking equally with, or after, the land attachment.

Section 113 – Report of sale

335. Section 113(1) imposes a duty on the appointed person to lodge a report of the sale with the sheriff clerk for the court which granted the warrant. That report must be lodged within 28 days of the date on which the sale price is paid. Subsection (2) provides for the form to be as prescribed in rules of court and for the content of the report.

336. Subsection (3) provides that, if the appointed person submits a report after the specified period has expired, or refuses to submit or delays submitting a report, the sheriff may make an order providing that the appointed person will not be entitled to payment of some or all of the expenses incurred in executing the warrant for sale.

Section 114 – Audit of report of sale

337. This section deals with auditing the report on sale lodged under section 113(1). The sheriff must forward it to the auditor of court. Subsection (2) provides that the auditor must tax the expenses chargeable against the debtor, confirm the balance due to or by

the debtor following the sale and give a report to the sheriff. The auditor will not be entitled to charge a fee for the report (see subsection (3)).

338. Subsection (4) provides that the report of sale and the auditor's report will be held by the sheriff clerk, and be available for inspection, for a time prescribed by rules of court. A fee for inspection may be prescribed in an order under section 2 of the Courts of Law Fees (Scotland) Act 1895.

Section 115 – Sheriff's consideration of report

339. This section provides for the sheriff's powers on receiving the auditor's report. Under subsection (1), the sheriff may, after considering that report and the report of sale lodged under section 113(1), make an order approving the report of sale subject to any amendments made following a hearing with all interested parties or by the auditor. Alternatively, the sheriff may, if satisfied that there has been a substantial irregularity in the land attachment, make an order declaring the land attachment void and making any consequential order which the sheriff considers necessary in the circumstances.

340. Subsection (3) deals with intimation of the sheriff's order by the sheriff clerk. Subsection (4) provides that any order declaring the land attachment void does not affect the title of any person who purchased the attached land under the warrant for sale.

Section 116 – Proceeds of sale

341. Section 116(1) provides for the distribution of the proceeds of the sale where land is sold in execution of a warrant for sale. The appointed person must disburse the proceeds in the following order—

- any expenses due to the creditor under section 114(2)(a);
- any sums due to any creditor holding a security or diligence over the land which ranks before the land attachment;
- any sums due to—
  - the creditor who executed the land attachment; and
  - any creditor under a security or diligence which ranks equally with the land attachment;
- any sums due to any other creditor under any security or diligence which ranks after the land attachment; and
- any balance due to the debtor (subject, however, to section 37(8C)(b) of the 1985 Act, which requires the appointed person, where the debtor's estate has been sequestrated, to pay over any balance due to the debtor to the trustee in sequestration).

342. The appointed person is entitled to fees and expenses for dealing with the land attachment (unless the sheriff has limited them under section 113(3)). These shall be met by the creditor. The appointed person may deduct his or her fees and expenses from the sum paid to the creditor (see subsection (2)).

343. Subsection (3) provides that, if there is a balance of the proceeds due to the debtor, the appointed person must pay that balance to the debtor or other person authorised to give a receipt for it.

344. Subsection (4) obliges a creditor who receives the sums due under a security or diligence to grant a discharge of that security or diligence.

345. Subsections (5) and (6) provide that, if the appointed person is unable to obtain a receipt or discharge relating to the distribution of the proceeds of sale from the debtor or any creditor, the appointed person may consign the amount due to the person in the sheriff

court. That consignation will discharge the duty to pay the amount due and a certificate of the sheriff clerk will be evidence of the discharge.

Foreclosure

Section 117 – Foreclosure

346. Section 117 provides for what happens where the appointed person has exposed the land to sale but has failed to find a buyer or has succeeded in selling only part of the land at a price which is less than the amount secured by the land attachment and any other security or diligence ranking before or equally with the land attachment. This section provides that the court may, among other things, grant decree of foreclosure, which transfers the land to the creditor.

347. Subsections (2) to (4) provide for the procedure to be followed by the appointed person when applying for a decree of foreclosure. The application must be accompanied by a statement setting out the whole amount secured by the land attachment and secured by any other security or diligence ranking before or equally with the land attachment. Where part of the land has been sold, a report on that sale under section 113(1) must accompany the application. A copy of the application must be served by a judicial officer on the debtor, any occupier of the land specified in the warrant for sale, the creditor in any heritable security affecting the land and any other person with a land attachment or other diligence over the land. The application, statement and report can be sent electronically (see subsection (9)).

348. Subsection (5) provides that the sheriff, after allowing any person served with a copy of the application an opportunity to make representations, may grant the decree of foreclosure straightaway, may suspend the application for no more than 3 months to allow the debtor to pay the sum recoverable by the land attachment or may, instead, appoint a valuer to fix a reserve price at which the land must be auctioned or advertised for sale and, if unsold, auctioned.

349. Subsection (6) provides the debtor may bid and purchase at any auction or purchase at the price advertised for sale. Subsection (7) provides that the sheriff may, where the appointed person produces an auctioneer's certificate that the land remains unsold at the reserve price or that the land did not achieve a sale at the advertised price, grant decree of foreclosure.

350. Subsection (8) provides a decree of foreclosure must be in the form prescribed by rules of court, provide a description of the land and contain a declaration of the price the creditor is deemed to have paid for the land (which is relevant for the purposes of section 118(2)).

Section 118 – Registration of decree of foreclosure

351. Section 118 provides for the effects of registration of the decree of foreclosure in the appropriate property register. Subsection (1) provides that the debtor's right to bring the land attachment to an end by paying the debt is removed and the land will vest in the creditor. At the same time, the land will no longer be subject to the land attachment, securities or any diligence ranking after the land attachment and the creditor will have the right to redeem any security or diligence ranking prior to or equally with, the land attachment. Effectively, the creditor will now own the land (or, in the case of a long lease, will become the tenant in place of the debtor).

352. Subsection (2) provides that, despite the decree of foreclosure, the debtor will remain liable for any balance due to the creditor which is not extinguished by the price at which the creditor is (under section 117(8)(c)) deemed to have acquired the land and for any sums due to any creditor under a postponed security. Subsections (3) and (4) provide that the creditor's title will not be challengeable on the ground of any irregularity in

the diligence or foreclosure proceedings although the debtor will retain a right to claim damages for wrongful diligence.

Payments to account and expenses

Section 119 – Ascription

353. This section provides that, where any sums are recovered by land attachment or are paid by the debtor while the attachment is in force, those sums will be ascribed to the following heads of claim in the following order—

- the expenses of the land attachment chargeable against the debtor;
- interest on the debt due as at the date the notice of land attachment was registered;
- the debt due and any interest on it which has accrued since the registration of the notice.

Section 120 – Expenses of land attachment

354. Section 120 provides that the expenses incurred by the creditor in carrying out the land attachment will be chargeable against the debtor and can be recovered only by the land attachment itself and not by any other legal process. Any expenses not recovered by the time the land attachment is completed will cease to be chargeable against the debtor.

355. Subsection (5) gives the sheriff power, if satisfied that the debtor has objected on frivolous grounds to an application for a warrant for sale or for decree of foreclosure, to award expenses against the debtor not exceeding an amount prescribed by the Scottish Ministers by regulations (such regulations are subject to negative resolution procedure (see section 224(3)). Expenses awarded under subsection (5) do not cease to be chargeable against the debtor if not recovered by the time the land attachment is completed.

Termination, discharge etc. of land attachment

Section 121 – Termination by payment etc.

356. Section 121(1) covers the situation where the debt owed is paid or tendered after a notice of land attachment is registered but before the land attachment is created. It provides that, if the full sum owed is paid or tendered to the creditor, a judicial officer or any other person authorised to receive payment on behalf of the creditor before the expiry of 28 days from the date the notice of land attachment is registered, no land attachment is created and the notice ceases to have effect.

357. Subsections (2) and (3) cover the situation where such payment is made or tendered after a land attachment is created. The land attachment will cease to have effect if the debtor pays or tenders the sum owed to the creditor, judicial officer or other person authorised to receive it provided the debtor does so before either a contract of sale is concluded or a decree of foreclosure is registered.

Section 122 – Discharge

358. Section 122 applies where the debtor complies with section 121 and either the notice of land attachment or the land attachment ceases to have effect. The creditor must discharge the notice of land attachment or the land attachment if the expenses of discharge are also paid or tendered to the persons specified in section 121(1). It is competent to register the discharge (which must be in the form prescribed in rules of court) in the property registers.

Section 123 – Recall and restriction of land attachment

359. Section 123 provides for the sheriff's powers to recall or restrict a land attachment.

360. Subsections (1) and (2) provide that the debtor or any other interested person may apply to the sheriff for an order recalling or restricting a land attachment. The application must be in the form prescribed by rules of court and be notified to the creditor.

361. Subsection (3) provides that the sheriff must make an order for recall if satisfied that the land attachment is invalid, has been carried out incompetently or irregularly, has ceased to have effect or the creditor is obliged to discharge it under section 122(2)(b) (because the debtor has paid or tendered payment of the sum due). Subsection (4) provides that the sheriff may make an order restricting the land attachment if satisfied that significantly more land is attached than need be and it is reasonable to restrict the attachment.

362. Subsections (5) and (6) provide that an order for recall or restriction must be in the form prescribed by rules of court and that it is competent for a person who obtains such an order to register it in the property registers.

Section 124 – Duration of land attachment

363. Section 124(1) provides that a land attachment will cease to have effect 5 years after the date on which the notice of land attachment was registered, if not terminated earlier by payment, by discharge or by recall under section 123 (order of the sheriff).

364. Subsections (2) to (4) give the creditor power to extend that period for a further 5 years. To extend the period the creditor must register a notice of extension in the form prescribed by rules of court within 2 months before the current 5-year period expires. The creditor may extend the period on more than one occasion.

Land attachment subsequent to reduction of deed granted in breach of inhibition

Section 125 – Land attachment subsequent to reduction of deed granted in breach of inhibition

365. Section 125 provides for the situation where a debtor has been inhibited, breaches the inhibition by disposing of the property affected and the inhibiting creditor reduces the transaction which breached the inhibition. Taking the example of the sale of inhibited land, the reduction of the disposition granted by the debtor is *ex capite inhibitionis*. This means that, in any question between the creditor and the debtor, the debtor is regarded as still having title to the land. However, the person who purchased the land from the debtor, in a question with anyone other than the creditor, has that title.

366. Land attachment is normally competent only against land in respect of which the debtor has a recorded or registered title (see section 82(2)). Where the disposition granted in breach of inhibition is reduced, the debtor does not have recorded or registered title. Section 125 provides that, notwithstanding section 82(2) and this rule from the law of inhibition, the inhibiting creditor who has reduced the disposition may proceed to register a notice of land attachment over the land. A land attachment may subsequently be created and this section makes the necessary modifications to other sections in this Chapter to take account of the fact that the purchaser from the debtor (the "third party") needs to be involved in the land attachment process.

367. In addition, subsection (2) provides that the land attachment registered in the circumstances mentioned in subsection (1) enjoys preference in ranking in any competition with a security granted in favour of, and a land attachment executed by, a creditor of the third party.

General and miscellaneous

Section 126 – Land attachment as heritable security

368. This section clarifies that a land attachment is not a heritable security for the purposes of the Heritable Securities (Scotland) Act 1894 and that the remedies of the creditor on default of the debtor under that Act are not therefore available to the creditor under a land attachment.

Section 127 – Statement on impact of land attachment

369. This section requires the Scottish Ministers to publish and to lay before the Scottish Parliament a statement of the impact that land attachment has had on debt recovery and homelessness.

370. Subsection (1) provides that this must be done within 15 months of the commencement of this Chapter of the Act. Subsection (2) sets out the information which the statement is required to include. Subsection (3) defines "homelessness" for the purposes of this section (by attracting the definition in the Housing (Scotland) Act 1987) to mean, effectively, lack of accommodation or lack of accommodation which it would be reasonable for the person involved to continue to occupy.

Section 128 – Interpretation

371. This section defines what is meant by expressions used in this Chapter. In particular, subsection (2) modifies the terminology used in relation to ownership and transfer of land so that it can be read as covering the equivalent terminology appropriate to attached land which is a long lease. Subsection (3) also provides the Scottish Ministers with power to modify the definitions of "decree" and "document of debt". That power is exercisable by order subject to negative resolution procedure (see section 224(3)).

Chapter 3 – Residual attachment

Residual attachment

Section 129 – Residual attachment

372. This section introduces a new form of diligence over property of a debtor to be known as residual attachment.

373. Subsection (2) gives the Scottish Ministers power by regulations to specify the kind of property that may be attached by residual attachment. That power is subject to subsections (3) and (4) and is subject to negative resolution procedure (see section 224(3)).

374. Only property which is transferable and which cannot be attached by any other diligence can be specified. In addition, property which is exempt from all diligence or from a particular diligence (such as the property listed in section 11 of the 2002 Act) cannot be specified. Finally, property of which the debtor is the tenant and which is either a dwellinghouse used by the debtor as a sole or main residence or which is a croft cannot be specified.

375. Subsection (5) makes it clear that property of a debtor which is of a kind specified as attachable by residual attachment can be attached even though it is owned in common by the debtor and a third party.

376. Subsections (6) and (7) give further content to the power of the Scottish Ministers to specify property under subsection (2). In particular, subsection (7) envisages that the regulations may make provision for how that particular kind of property can be attached and how its value can be realised in order to pay off the debt secured by the residual attachment.

377. As section 130 makes clear, residual attachment is available only in execution and not on the dependence and it cannot be executed as of right but must be sanctioned by the court.

378. Subsection (8) further expands the power in section 129(2) by enabling regulations to be made about the effect of the making of time to pay directions and time to pay orders on the diligence of residual attachment. It similarly gives power to make provision about the effect of sequestration on residual attachment.

Application for residual attachment order

Section 130 – Application for residual attachment order

379. This section provides for the first stage of the residual attachment process. The creditor must obtain a residual attachment order (under section 132) before then obtaining a satisfaction order (under section 136).

380. This section governs the application by a creditor for a residual attachment order. The creditor may apply only where the debt is established by a decree or a document of debt, the debtor has been charged to pay the debt, and the period for payment has expired without payment being made. It also provides that where the debtor is an individual, the creditor must provide the debtor with a debt and information package within the 12 weeks before the application is made.

381. "Decree" and "document of debt" are defined in section 145 (as read with section 221) of the Act. The "debt advice and information package" is the same package required, in the case of attachment of moveables, by section 10 of the 2002 Act (see section 221(1)).

382. An application for residual attachment must be in the form prescribed in rules of court, must specify the property to be attached and must set out how the creditor intends to realise the value of the property which the creditor proposes to attach. The debtor and any person having an interest in the property must be notified of the application. A person notified of the application may lodge objections to the application before the 14 day period for doing so has expired (see subsection (3)).

Section 131 – Effect of application for residual attachment order

383. This section sets out the effects on the debtor and other persons where the creditor makes an application for a residual attachment order. The debtor must not, from the date the application was served until the court either makes a residual attachment order or dismisses the application, take any of the steps set out in subsection (3). Those steps are transferring or otherwise disposing of the property, burdening the property, granting any licence in relation to the property or entering into any agreement to do any of these steps. Subsection (4) provides that any such steps are void and subsection (5) provides that a breach of this section by the debtor or any other person may be dealt with as a contempt of court. Contempt of court is punishable by any of, or a combination of, admonition, fine and, in extreme cases, imprisonment or detention.

Residual attachment order

Section 132 – Residual attachment order

384. This section provides for the making and effects of a residual attachment order.

385. Subsection (1) provides that at the hearing on the application for a residual attachment, the court must allow any person who has lodged an objection a chance to be heard.

386. Subsection (2) provides that the court may, if satisfied that the application is in order, make a residual attachment order which (in terms of subsection (3)) must specify the property to be attached. The order must be intimated by the creditor to the debtor and any other person the court specifies. The order must also specify the persons on whom

the schedule of residual attachment (see section 133) must be served. When making a residual attachment order, the court may make any other order the court considers appropriate. Subsection (5) makes further provision about the kinds of ancillary orders the court may make.

387. Under subsection (4), the court must refuse the application if either the property specified in it cannot be attached by residual attachment or the creditor's proposals for realising the value of the property would be ineffective (either in realising any value or, where the value was realised, in realising a sum which would be too small to result in the debt being paid off or reduced).

Section 133 – Schedule of residual attachment

388. This section provides for the necessary step which the creditor must take if that creditor wants to create a residual attachment (see section 134). Where the court grants a residual attachment order, the creditor may serve a schedule of residual attachment.

Section 134 – Creation and effect of residual attachment

389. This section provides a residual attachment is created at the beginning of the day after the schedule of residual attachment is served on the debtor. Subsection (2) provides for the effects of a residual attachment. The residual attachment gives the creditor a security over the attached property for the "sum recoverable by the residual attachment". That sum is the sum (principal and accrued interest) for payment of which the charge was served together with any interest which may be accrued before the debt is paid and all expenses of the residual attachment which are chargeable against the debtor.

Satisfaction order

Section 135 – Application for satisfaction order

390. Where a creditor has created a residual attachment over property of a debtor, and the debtor does not pay off the debt, the next step will be an application to the court for a satisfaction order.

391. Section 135 makes provision for applications for satisfaction orders and is in similar terms to section 130 (application for residual attachment order). The application must, among other things, be accompanied by a copy of the schedule of residual attachment and any other document prescribed by rules of court. Provision is made that the application, schedule and any other document can be sent electronically. Any person wishing to object to the application must do so within 14 days of the intimation of the application to that person.

Section 136 – Satisfaction order

392. This section provides for the making and effects of a satisfaction order.

393. Subsection (1) provides that, at the hearing on the application, under section 135(1), for the satisfaction order, the court must allow those who have lodged objections an opportunity to be heard.

394. Subsection (2) provides for when the court can make a satisfaction order. The court may make a satisfaction order if it is satisfied the application is in order and provided it is not obliged by subsection (6) to refuse the application. Subsection (3) provides that a satisfaction order must specify the property to which it applies and must require the creditor to intimate it to the debtor and other persons the court specifies.

395. Under subsection (4), a satisfaction order may authorise the sale of the attached property, the transfer of the property to the creditor, the transfer of income derived from the property to the creditor or the granting by the creditor of leases or licences of the property. The types of order listed in subsection (4) are not exclusive. In addition,

section 129(7)(d) envisages that the Scottish Ministers may make provision for the types of satisfaction orders that may be made in respect of particular types of property.

396. Where a satisfaction order is made which authorises sale of the property, the court must appoint a qualified person to carry out the sale and specify a period within which that should happen (the "appointed person" – see subsection (5)(a)). In the case of any kind of satisfaction order, the court may appoint a suitably qualified person to provide a report to the court on the market value of the property (subsection (5)(b)).

397. Subsections (6) and (7) determine when the court must refuse an application for a satisfaction order. The grounds in subsection (7) partially mirror those in section 132(4) (grounds for refusing application for residual attachment order).

398. Subsection (8) gives the court power, if it thinks that making a satisfaction order would be unduly harsh to the debtor or a third party, to either refuse the application or make one but suspend it for a year.

Section 137 – Intimation of court's decision

399. Section 137(1) provides that, where a satisfaction order is made under section 136(2), the creditor must send a copy of the order to the debtor, the appointed person and any other person the court specifies.

400. Subsection (2) provides that, where an application is refused, the court must send a copy of the order to the debtor and to any other person the court considers has an interest.

Section 138 – Effect of certain refusals of application for satisfaction order

401. This section provides that the refusal of an application for a satisfaction order on the ground mentioned in section 136(7)(c) (that is, the implementation of the satisfaction order sought would not result in the debt being paid off or reduced, either because the value of the property attached would not be realised at all or the value realised would be too small) does not lift the residual attachment. In other words the creditor still has the protection of the security over the attached property – which could give that creditor priority if the debtor is sequestrated. In addition, the creditor can make another application for a satisfaction order at a later date, perhaps with a different proposal as to how the value of the attached property might be realised.

Termination, discharge etc. of residual attachment

Section 139 – Termination by payment etc.

402. This section covers the situation where the debt owed is paid or tendered after a residual attachment is created. It provides that the residual attachment will cease to have effect if the full sum recoverable by the residual attachment is either paid or tendered to the creditor, the appointed person, a judicial officer or another person authorised to receive payment on behalf of the creditor. Where a satisfaction order has been made, the residual attachment will not cease to have effect unless the sum is paid or tendered before the contract of sale is concluded (where the satisfaction order authorises sale) or the property is otherwise disposed of.

Section 140 – Recall

403. This section provides for the court's powers to recall or restrict a residual attachment.

404. Subsections (1) and (2) provide that the debtor or any other person having an interest may apply to the court for an order recalling or restricting the residual attachment. The application must be in the form prescribed in rules of court and be notified to the creditor.

405. Subsection (3) provides that the court, if satisfied that a residual attachment is invalid, has been carried out incompetently or irregularly or that it has ceased to be in force, may make an order recalling the residual attachment. Subsection (4) provides that, where the court is satisfied that significantly more property is attached than need be and it is reasonable to do so, it may make an order restricting the effect of the residual attachment to only that part of the property to which it relates.

406. Subsection (5) provides that an order for recall or restriction must be in the form prescribed by rules of court.

Section 141 – Duration of residual attachment

407. This section provides that, subject to the court extending the period under subsection (2), a residual attachment will cease to have effect at the end of 5 years beginning with the day after the day the schedule of residual attachment is served. Subsections (2) and (3) provide that the court may extend that period on the application of the creditor and may do so on more than one occasion.

Section 142 – Effect of death of debtor

408. This section provides that where the creditor has taken steps to carry out a residual attachment but has not served a schedule of residual attachment on the debtor before the death of the debtor, no residual attachment is created and the residual attachment order will fall. Where a residual attachment is created before the death of the debtor, it will continue and the creditor will be entitled to continue the attachment against the debtor's executor or other representative. Rules of court may modify the procedures for residual attachment under this Chapter to reflect the circumstances covered by this section.

General and miscellaneous

Section 143 – Expenses of residual attachment

409. This section provides that the expenses incurred by the creditor in carrying out the residual attachment will be chargeable against the debtor and can be recovered only by the attachment and not by any other legal process. Any expenses not recovered by the time the residual attachment is completed will cease to be chargeable against the debtor. Subsection (5) gives the court power, if satisfied that the debtor has objected on frivolous grounds to an application for a satisfaction order, to award expenses against the debtor not exceeding an amount prescribed by the Scottish Ministers by regulations.

Section 144 – Ascription

410. This section provides that, where any sums are recovered by residual attachment or are paid by the debtor while the attachment is in force, those sums must be ascribed to the following heads of claim in the following order—

- the expenses of the residual attachment chargeable against the debtor;
- interest on the debt due as at the date the residual attachment order was made;
- the debt due and any interest on it which has accrued since the making of that order.

Section 145 – Interpretation

411. This section defines what is meant by expressions used in this Chapter. It also provides the Scottish Ministers with power to modify the definitions of "decree" and "document of debt". That power is exercisable by regulations subject to negative resolution procedure (see section 224(3)).

Part 5 – Inhibition

Creation

Section 146 – Certain decrees and documents of debt to authorise inhibition without need for letters of inhibition

412. This section replaces the existing common law on when it is competent to inhibit in execution (for inhibition on the dependence, see Part 6 of this Act).

413. Subsection (1) provides that inhibition in execution is competent to enforce payment of a debt constituted by a decree or document of debt or to enforce an obligation to perform a particular act (sometimes referred to as an obligation *ad factum praestandum*). Inhibition is competent only to enforce that kind of obligation where it is contained in a decree (so it is not competent to inhibit in execution of an obligation contained in a document of debt) and the action in which the decree is obtained either contained an alternative conclusion or crave for payment of money (for example, payment of damages if the obligation was not adhered to) or was an action demanding the conveyance of or granting of a real right in heritable property (subsection (2)).

414. Subsections (3) to (5) insert provisions relating to an inhibition for ordinary debt into the Writs Execution (Scotland) Act 1877, Sheriff Courts (Scotland) Extracts Act 1892 and the 1987 Act which provide that extract decrees or documents for payment automatically carry a warrant for inhibition (including extracts of decrees granted in the sheriff court). Previously, the sheriff could not grant warrant for inhibition in execution and a creditor wishing to inhibit in execution of a sheriff court decree had to apply by letters of inhibition to the Court of Session. The amendments made by these subsections mean that there is now no need to apply for such letters of inhibition and subsection (6) abolishes this procedure.

415. Subsection (7) provides that the sections 165 and 166 (dealing with expenses and allocation of sums paid to account) do not apply to inhibitions executed to enforce the performance of an obligation. This is because there is no principal sum along with which expenses could be recovered under section 166 and no sum can be paid to account when there is no principal sum being recovered. This section also modifies the references to "debtor" and "creditor" in sections 158 to 160 and 163 to make it clear that, in the case of inhibition to enforce performance of an obligation, those references make sense even though no money debt is involved.

416. Subsection (8) defines "decree" and "document of debt" by reference to section 221 of the Act. Subsection (9) provides for those definitions to be modified by the Scottish Ministers by regulations. Those regulations will be subject to negative resolution procedure (see section 224(3)).

Section 147 – Provision of debt advice and information package when executing inhibition

417. Section 147 provides that a creditor executing certain inhibitions must provide the debtor (where the debtor is an individual) with a debt advice and information pack. Those inhibitions are—

- inhibitions in execution of a decree for payment and
- inhibitions in execution of a decree containing an obligation (other than an obligation to convey heritable property or to grant rights in such property) to perform a particular act where the action in which that decree was obtained also contained an alternative conclusion or crave for payment of money (other than expenses).

418. An inhibition in execution will be incompetent if the debtor is not provided with the debt advice and information package at the same time as the schedule of inhibition is

served. The debt advice and information package is the same package required, in the case of attachment of moveables, by section 10 of the 2002 Act (see section 221).

Section 148 – Registration of inhibition

419. This section provides that an inhibition is registered only by registering the schedule and certificate of inhibition in the Register of Inhibitions. This section should be read with section 155 of the Titles to Land Consolidation (Scotland) Act 1868 (as substituted by section 149 of this Act). The schedule and certificate must be in the form prescribed by the Scottish Ministers by regulations (such regulations being subject to negative resolution procedure (see section 224(3)).

Section 149 – Date on which inhibition takes effect

420. This section replaces section 155 of the Titles to Land Consolidation (Scotland) Act 1868 with a new version of that section.

421. New section 155 provides that an inhibition takes effect on the day it is registered unless

- a separate notice of inhibition is registered in the Register of Inhibitions;
- the schedule of inhibition is served on the debtor after that notice is registered; and
- the inhibition is registered before 21 days have expired from the date of registering the notice.

422. In those circumstances, the inhibition takes effect from the date of the serving of the schedule. A notice of inhibition must be in the form prescribed by the Scottish Ministers by regulations. By virtue of section 159B of the 1868 Act (inserted by section 164 of this Act), such regulations are subject to negative resolution procedure.

Effect

Section 150 – Property affected by inhibition

423. Section 150(1) provides that inhibition may affect any heritable property. This is subject, however, to section 153, which limits the property that may be affected by an inhibition in certain cases.

424. Subsection (2) provides that any rule of law authorising inhibition against any other category of property is abolished. In particular, the rule that inhibition may affect property which may be subject to the diligence of adjudication (which is not limited to heritable property) is abolished by this provision.

425. Subsection (3) states that property is acquired on the day the deed transferring the property is delivered. For the purposes of subsection (1) this means that, where a person has a deed delivered to them which transfers ownership of a house to them, an inhibition executed against that person will affect the house even if the person's title to the house has yet to be registered. This subsection also applies to section 157 of the Titles to Land Consolidation (Scotland) Act 1868 which states that inhibition does not affect property acquired by a debtor after the inhibition is executed. So if inhibition is executed before the day that a deed transferring a house is delivered, the house will not be affected by the inhibition.

Section 151 – Effect on inhibition to enforce obligation when alternative decree granted

426. This section provides that where there is an inhibition to enforce a decree for performance of a particular act and subsequently a decree for the alternative conclusion for payment is granted (for example, following failure to comply with the original decree), the inhibition continues in force and is treated as if it was executed to enforce

payment under the later decree. Without this provision, the inhibition would lapse and a new inhibition would have to be executed to enforce the decree for payment.

Section 152 – Effect of conversion of limited inhibition on the dependence to inhibition in execution

427. This section applies to the situation where a creditor obtains a decree for payment of all or part of a principal sum in an action in which the creditor had executed inhibition on the dependence. Under section 15J(b) of the 1987 Act (inserted by section 169 of this Act) the court can limit the warrant allowing inhibition on the dependence to specified property. The effect of this section is that when that limited inhibition turns into an inhibition in execution of the decree (which happens when decree is granted) it is no longer limited to that property.

Section 153 – Property affected by inhibition to enforce obligation to convey heritable property

428. This section provides that where an inhibition is executed to enforce a decree for implement of an obligation to convey or grant a real right in heritable property, the inhibition is limited to the heritable property to which the decree relates. This section therefore modifies, in the cases to which it applies, the effect of section 150.

Section 154 – Inhibition not to confer a preference in ranking

429. This section abolishes the rule that an inhibition confers a preference by exclusion in any sequestration, insolvency proceedings or other process in which there is ranking. Inhibitions no longer confer any preference. However, this section does not affect any preference in a sequestration or proceedings where the inhibition is executed before this section comes into force even if the ranking process itself does not begin until after the section comes into force. Subsection (4) defines "insolvency proceedings".

Section 155 – Power of receiver or liquidator in creditors' voluntary winding up to dispose of property affected by inhibition

430. Section 155(2) amends the Insolvency Act 1986 by inserting section 61(1A) which provides that an inhibition which comes into force after the creation of a floating charge is not an effectual diligence. This means the inhibition does not restrict the power of a receiver appointed under such a floating charge to deal with any property which would normally be affected by the inhibition. Section 38(3) of this Act determines the date of the creation of a floating charge.

431. Subsection (3) inserts section 166(1A) into the Insolvency Act which provides that a liquidator in a winding up can exercise his or her power under Schedule 4 of that Act to sell property without that being affected by any inhibition in effect against the company's property.

Termination

Section 156 – Termination of effect of inhibition

432. This section repeals the second reference to "inhibitions" in section 44(3)(a) of the Conveyancing (Scotland) Act 1924 and inserts section 44(3)(aa). Both amendments have the effect of clarifying that all inhibitions will cease to have effect after 5 years have expired from the date on which they come into force. They are not, therefore, subject to the 5-year negative prescription period nor to the rules on interruption or extension of that period.

Section 157 – Inhibition terminated by payment of full amount owing

433. This section applies where an inhibition is executed to enforce payment of a debt and a sum is paid in respect of that debt to the creditor, a judicial officer or any other person who has authority to receive payment on behalf of the creditor. Where the sum paid amounts to the total debt plus interest, the inhibition expenses and the expenses of discharging the inhibition, the inhibition will cease to have effect. This replaces the common law rule that payment or the tendering of payment of the debt alone (excluding expenses) brought the inhibition to an end (see subsection (3)). But this section does not apply to inhibition on the dependence (see subsection (4)).

Section 158 – Inhibition terminated by compliance with obligation to perform

434. This section provides that where a decree for the performance of a particular act (a decree *ad factum praestandum*) is complied with, any inhibition executed to enforce that decree ceases to have effect.

Section 159 – Termination of inhibition when property acquired by third party

435. Section 159(1) provides that, despite the fact that the conveyance or granting of a right in property affected by an inhibition is a breach of the inhibition (see section 160), an inhibition ceases to affect the property if the conveyance or granting of the right is for value and is made to a person acquiring the property or right who acts in good faith. In other words, the person acting in good faith acquires the property or right free of the encumbrance of the inhibition. This applies regardless of whether the person acquiring the property does so from the inhibited debtor or from another person who themselves had acquired from the debtor (or who acquired from such a person etc.) (see subsection (3)). Only the person acquiring the property or right needs to act in good faith for the inhibition to cease to affect that property.

436. Subsection (2) is in similar terms to section 137(3) and provides that, for the purposes of subsection (1), a person acquires property or a right in it when the deed conveying the property or granting the right is delivered to that person.

437. Subsection (4) provides that a person is assumed to act in good faith if the person does not know about the inhibition and has taken all reasonable steps to find out whether or not an inhibition exists affecting the property in question. An example of taking all reasonable steps might be where a buyer of a house instructs a search taken up to the date of completion of the sale (or whatever date close to that is reasonable according to current practice) in the Register of Inhibitions against the seller and any previous owner against whom an inhibition could be in force affecting the house and the search fails to disclose the existence of the inhibition.

Breach

Section 160 – Breach of inhibition

438. This section provides that an inhibited debtor breaches an inhibition when the debtor delivers a deed to a third party transferring or granting a right in any property which is affected by the inhibition. As with sections 150(3) and 159(2) it is the date of delivery of the deed which is relevant. That is the date on which the breach occurs, rather than the date of conclusion of the missives for the transfer or the dates of grant or registration of the deed.

Section 161 – Prescription of right to reduce transactions in breach of inhibition

439. This section removes any doubt that the 20 year period of long negative prescription (set out in section 8(1) of the Prescription and Limitation (Scotland) Act 1973) applies to the right of an inhibitor to have a deed, granted in breach of an inhibition, reduced.

Section 162 – Registration of notice of litigiosity and discharge of notice

440. This section inserts new section 159A into the Titles to Land Consolidation (Scotland) Act 1868.

New section 159A – Registration of notice of summons of action of reduction

441. This section applies where an inhibiting creditor raises an action of reduction of a deed granted in breach of an inhibition. The inhibiting creditor must register a notice of the signeted summons in the action in the Register of Inhibitions and in the Land Register of Scotland or the Register of Sasines (see subsection (2)). This provides notice in the personal and the property registers that the land in question is litigious pending the outcome of the action of reduction. An inhibiting creditor who fails to obtain a decree of reduction will discharge the notice in the form prescribed by regulations so that the land no longer appears as litigious in the property registers (see subsection (3)).

Section 163 – Reduction of lease granted in breach of inhibition

442. This section applies where an inhibited debtor grants a lease of land affected by inhibition. A lease granted in those circumstances will be reducible if it has at least 5 years left before comes to an end as at the date on which the action for reduction of the lease is raised. A lease which is not capable of lasting 5 years after that date will be reducible only if the Court of Session is satisfied that in all circumstances it would be fair and reasonable to reduce it. Subsection (4) specifies how to calculate the unexpired duration of a lease.

General and miscellaneous

Section 164 – Power to prescribe forms in the 1868 Act

443. Section 164(1) amends section 159 of the 1868 Act to replace the reference to notices registered under that section being in the form of Schedule RR to that Act with a reference to them being in such form as may be prescribed. Subsection (2) inserts new section 159B into the 1868 Act (new section 159A already being inserted by section 162 of this Act). Section 159B provides that the power to prescribe the form of notices in sections 155, 159 and 159A of the 1868 Act is exercisable by the Scottish Ministers by regulations subject to the negative resolution procedure of the Scottish Parliament.

Section 165 – Expenses of inhibition

444. Section 165(1) provides that the expenses incurred by the creditor in carrying out an inhibition will be chargeable against the debtor but (by virtue of subsection (3)) the expenses of only one further inhibition in relation to the same debt as the original inhibition will be chargeable against the debtor. This makes it clear that, although an inhibition lasts for only 5 years (see section 156), the creditor can re-inhibit at the end of that period. However, the expenses of doing so on one occasion only are recoverable from the debtor.

445. Subsection (2) provides that inhibition expenses will be recoverable from the debtor only by land attachment or residual attachment executed to recover the debt to which the inhibition relates. There is no other legal method available to recover these expenses.

446. Subsection (4) provides that in a sequestration or other process where there is ranking, the inhibition expenses will be treated as part of the debt to which the inhibition relates. This section and sections 157 and 166 do not apply to an inhibition on the dependence (see section 157(4)).

Section 166 – Ascription

447. This section applies where an inhibition executed to enforce payment of a debt is in force and any payment is made by the debtor on account of the total recoverable by the inhibiting creditor. The payments made on account are allocated to the sum recoverable in the following order—

- the expenses of any other diligence chargeable against the debtor;
- the inhibition expenses;
- interest on the sum due as at the date the inhibition came into force;
- the debt to which the inhibition relates and any interest due after the date the inhibition comes into force.

Section 167 – Keeper's duty to enter inhibition on title sheet

448. This section inserts subsection (1A) into section 6 of the Land Registration (Scotland) Act 1979.

449. New subsection (1A) provides that the Keeper must enter an inhibition registered in the Register of Inhibitions in the title sheet of a property only where the property (or a right in it) has been transferred or created in breach of the inhibition.

Section 168 – Inhibition effective against judicial factor

450. This section provides that, irrespective of the appointment of a judicial factor on an inhibited debtor's estate, the inhibition will continue in force. This will not be the case where the inhibited debtor is dead and a judicial factor is appointed under section 11A of the Judicial Factors (Scotland) Act 1889.

Part 6 – Diligence on the Dependence

Section 169 – Diligence on the dependence

451. Section 169 inserts a new Part 1A into the 1987 Act (after section 15). This new Part sets out a new regime for the granting, execution, effect, recall and expenses of diligence on the dependence and replaces some of the pre-existing common law on this.

452. Diligence on the dependence of an action is a provisional or protective measure which is used during the progress of a court action, or just before an action is raised. As such, it gives the creditor (usually the pursuer in the action) security over the property of the person against whom the diligence is executed (usually the defender in the action) for any sum which the court may find the creditor entitled to.

453. There are two main types of diligence on the dependence, arrestment on the dependence and inhibition on the dependence. Both arrestment and inhibition can also be in execution of a decree or document of debt. Arrestment "freezes" goods or money owned by the defender which are held by a third party, who is usually called the "arrestee" (see also Part 10 of this Act and paragraphs 669 to 724 below on arrestment in execution). Inhibition has the effect of prohibiting the defender from selling heritable property by making deeds granted by the debtor in breach of the inhibition reducible (see also Part 5 of this Act and paragraphs 412 to 450 above on inhibition in execution).

454. There is also the diligence of admiralty arrestment on the dependence. This diligence follows a different process to arrestment on the dependence, although there are some broad similarities (see also Part 14 of this Act and paragraphs 770 to 807 below).

455. There is also now a new form of diligence on the dependence against goods of the debtor which the debtor holds. This is interim attachment, which is dealt with by Part 7 of this Act (see paragraphs 513 to 582 below).

Availability of diligence on the dependence

New section 15A – Diligence on the dependence of action

456. Section 15A(1) gives the Court of Session and the sheriff court equivalent powers to grant warrants for arrestment (including, to a certain extent, admiralty arrestments – see new section 15N) and inhibition on the dependence of a court action. How far the courts can exercise these powers is given further content by subsection (2) and sections 15C to 15F.

457. Subsection (1) extends the powers of sheriffs by giving them the power to grant a warrant for inhibition on the dependence. Under the present law, a pursuer who wishes to inhibit on the dependence of a sheriff court action has to obtain the warrant to do so from the Court of Session using a procedure which involves preparation and presentation of an Act and Letters of Inhibition. This procedure is abolished by section 146(6) of this Act.

458. Subsection (2) provides that a warrant for arrestment on the dependence is competent only where the action on the dependence of which it is sought contains a conclusion for payment of a sum of money other than expenses. Warrant for inhibition on the dependence is competent only where the action contains a similar conclusion for payment of money or where it contains a conclusion seeking specific implement of an obligation to convey heritable property to the creditor or to grant the creditor a real right in security, or some other right, over heritable property.

459. Subsection (3) provides that "action" in this Part of the 1987 Act includes in the sheriff court those brought as summary causes, small claims and summary applications as well as those brought as ordinary actions.

New section 15B – Diligence on the dependence of petition

460. Section 15B gives the Court of Session an additional power by providing that it is competent for the court to grant warrant for diligence by arrestment or inhibition on the dependence of a petition. How this power can be exercised is again given further content by subsection (2) and by sections 15C to 15F. Again, the court can grant warrant for arrestment on the dependence only where the petition contains a prayer for payment of a sum of money other than expenses. Warrant for inhibition on the dependence can be granted where the petition contains a similar prayer for payment or where it contains a prayer for specific implement of a similar obligation as that described in section 15A(2)(b)(ii).

461. Subsection (3) provides that legislation and rules of law relating to diligence on the dependence of actions are to apply to diligence on the dependence of petitions, so far as practicable and provided the contrary intention does not appear.

New section 15C – Diligence on the dependence to secure future or contingent debts

462. Section 15C provides that it will be competent for the Court of Session or the sheriff to grant warrant for diligence on the dependence of a conclusion for payment of a debt which is a future or contingent debt. Examples of such debts are aliment and financial support or a capital sum claimed in an action for divorce or nullity of marriage. These particular examples of future or contingent debts were formerly governed by section 19 of the Family Law (Scotland) Act 1985. That provision is now repealed (see schedule 6 to this Act). (See also paragraph 681681 below for a general description of what is meant by "future" and "contingent" debts).

463. Subsection (2) defines "court" for the purposes of sections 15D to 15M as the court before which the action or petition is being pursued. This will be either the Court of Session or the sheriff court except in the case of petitions, in relation to which (by virtue of section 15B) only the Court of Session may grant diligence on the dependence.

Application for diligence on the dependence

New section 15D – Application for diligence on the dependence

464. Section 15D(1) provides that at any time before a final decision has been taken in a court action, the "creditor" may apply for warrant for diligence on the dependence. In the scheme of the 1987 Act, "creditor" in this new Part means the person seeking to do diligence, and "debtor" means the person against whom that diligence is sought. Those terms are used throughout this Part. Section 15D should also be read with section 15G, which makes it clear that warrant for diligence on the dependence can be applied for, granted and executed before service of the summons in the action.

465. Subsection (2) requires the application for the warrant: (a) to be in the form, or nearly as may be in the form specified in rules in court; (b) to be intimated to the debtor and any other interested party; (c) to state where an immediate warrant is being sought before a hearing on the application; and (d) to include any other information which the Scottish Ministers require such applications to contain. That power is exercisable by regulations which (by virtue of section 104(1) of the 1987 Act) are subject to negative resolution procedure.

466. Subsection (3) provides that, where an immediate warrant is sought before a hearing of the application under section 15F, the application for warrant for diligence on the dependence need not be intimated.

467. Subject to section 15E, which enables the court to grant warrant without an initial hearing, subsection (4) requires the court to fix a date for a hearing on the application and to order the creditor to intimate that date to the debtor and any other person the court thinks has an interest.

New section 15E – Grant of warrant without a hearing

468. Subsections (1) and (2) of section 15E give the court power to grant a warrant for diligence on the dependence before an initial hearing of the application provided it is satisfied that—

- the creditor has a *prima facie* case on the merits of the court action;
- there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor, if warrant for diligence on the dependence were not granted in advance of such a hearing; and
- it is reasonable in all the circumstances including the effect granting warrant may have on any person having an interest, to grant the warrant.

469. Subsection (3) puts the onus of satisfying the court of the case for granting warrant in advance of a hearing on the creditor.

470. Subsection (4) requires the court, on granting warrant for diligence on the dependence without a hearing on the application to fix a date for a hearing under section 15K (recall of diligence on the dependence) and to require the creditor to intimate that date to the debtor and any other interested party.

471. Where a hearing has been fixed under subsection (4)(a), subsection (5) applies section 15K as if the debtor or a person having an interest had applied to the court for an order under that section.

472. In applying section 15K, this means that at the hearing the court must consider the validity of the warrant and any diligence on the dependence executed under it. The effect of section 15K(10) is to place the onus on the creditor to satisfy the court that a recall or restriction order should not be made.

473. Where the court is satisfied the warrant is invalid, it is under a duty to make an order recalling the warrant or any diligence on the dependence which has been executed under it (the court can also make an ancillary order) (section 15K(5)).

474. Subsection (6) provides that, where the court decides that a warrant should not be granted without a hearing and the creditor insists on pursuing the application, the court is obliged to fix a date for a hearing on the application under section 15F and to require the creditor to so notify the debtor and any other interested party.

New section 15F – Hearing on application

475. Section 15F sets out the procedure to be followed at a hearing on an application for warrant for diligence on the dependence. Such a hearing on an application takes place in respect of applications where the creditor either doesn't apply for a warrant to be granted in advance of a hearing or where the court refuses to make an order granting a warrant without a hearing.

476. Subsection (1) places a duty on the court, at the hearing, to give any person who received intimation of the hearing date (namely the debtor and any person appearing to the court to have an interest) the chance to make representations before the court makes a decision on the application.

477. Under subsections (2) and (3) the court may grant the warrant if it is satisfied as to the same matters which it is obliged to consider under section 15E(2), namely that—

- the creditor has a *prima facie* case on the merits of the court action;
- there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor, if warrant for diligence on the dependence were not granted; and
- it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to grant the warrant.

478. Subsection (4) puts the onus of satisfying the court that it should grant warrant on the creditor.

479. Subsection (5) provides for intimation by the creditor of the court's decision to the debtor and any other person it thinks has an interest.

480. Subsection (6) provides that, in refusing the warrant, the court may impose such conditions as it thinks fit. Subsection (7) gives examples of particular conditions which the court might impose under subsection (6). So, where the court refuses to grant warrant for diligence on the dependence but is satisfied that, nevertheless, there is a risk of any ultimate decree for payment in favour of the creditor not being met, it can order the defender to consign a sum into court against that eventuality.

Execution before service

New section 15G – Execution of diligence before service of summons

481. Section 15G applies where diligence on the dependence is executed before the summons in the action is served on the debtor. By virtue of sections 15A(3) and 15B(3), "summons" (which is the initiating document in a Court of Session action) is construed here as meaning also a petition (in the Court of Session) and, in the sheriff court, an initial writ (in an ordinary action and in a summary application) and a summons (in a summary cause and in a small claim).

482. Subsection (2) provides that if the summons is not served on the debtor within 21 days of the execution of the diligence on the dependence, the diligence ceases to have effect. This is subject to the power of the court to extend the period within which the summons needs to be served if the diligence is not to fall.

483. Subsections (3) and (4) deal with this and provide that the court may, on the application of the creditor, extend the period having regard to the efforts of the creditor to serve the summons within 21 days and any special circumstances preventing or obstructing service within that period.

Restriction on property attached

New section 15H – Sum attached by arrestment on dependence

484. This section and section 15J change the effect of diligence on the dependence. Currently, there is no monetary or other limit of value placed on a warrant for diligence on the dependence. This means that where an arrestment on the dependence is served the whole funds owed to the debtor by the arrestee are frozen, not just the amount sued for. Similarly an inhibition upon the dependence of an action affects all heritable property of the debtor even if it is worth far more than the amount sued for.

485. Subsections (1) and (2) provide that the court, when granting warrant for arrestment on the dependence, may limit the warrant by specifying an amount, which must not exceed a maximum amount calculated by reference to the formula set out in subsection (2). The maximum limit is calculated as being the aggregate of—

- the principal sum claimed;
- a sum of up to 20% of the principal sum (or such other percentage as the Scottish Ministers prescribe by regulations, subject to negative resolution procedure);
- interest at the judicial rate on the principal sum which would be accrued in 1 year;
- any sum which the Scottish Ministers prescribe by virtue of their power under subsection (3), being a sum which they think reasonably represents the likely expenses of an arrestment incurred by a creditor and chargeable against a debtor (the power being exercisable by regulations subject to negative procedure).

486. Subsection (4) provides that section 73F of the 1987 Act (which is inserted into that Act by section 206 of this Act) applies to arrestment on the dependence. The court, under section 15H, may restrict the total sum which may be arrested. But section 73F will operate whenever a creditor seeks to arrest a bank account to protect a minimum balance in that account. This paragraph should therefore be read with paragraphs 688 to 692 below.

New section 15J – Property affected by inhibition on dependence

487. Section 15J provides that where a court grants warrant for inhibition on the dependence in a case where the action is specifically to oblige the debtor to convey heritable property, to grant a real right in security or to grant some other right over the property to the creditor, the court must limit the property attached to that particular property. In any other case, the court may limit the property attached to such property it may specify.

Recall etc. of diligence on the dependence

New section 15K – Recall or restriction of diligence on dependence

488. Under section 15K, the debtor or any other person having an interest can apply to the court for any order set out in subsection (2). Those orders are an order recalling or restricting the warrant granted, if the warrant has been executed, an order recalling or restricting any arrestment or inhibition so executed, an order determining any question as to the validity, effect or operation of the warrant or an order ancillary to any other order sought.

489. Subsection (3) provides that any application under subsection (2) is to be in the form set out in Act of Sederunt (in other words rules of court). The application must be sent to the creditor and any other person with an interest. Subsection (4) provides that at the

hearing about an application made under subsection (2), all interested parties will be able to be heard by the court before any order is made.

490. Subsection (5) provides that, where the court is satisfied the warrant is invalid, it is under a duty to make an order recalling the warrant and any diligence on the dependence which has been executed under it (the court can also make an ancillary order).

491. Subsection (6) imposes a duty on the court to recall the diligence if the court is satisfied that an arrestment or inhibition exercised in pursuance of the warrant being challenged is incompetent. Again, the court may make any orders ancillary to such a recall as it thinks fit.

492. By virtue of subsection (7), where the court decides the warrant is valid it may still make an order recalling or restricting the warrant or diligence done under it (and any other order mentioned in subsection (2)) if it considers that an arrestment or inhibition executed in pursuance of the warrant is irregular or ineffective or if it is reasonable in all the circumstances, including the effect granting warrant may have had on any person having an interest, to do so. The power in subsection (7) is subject to subsection (8).

493. Subsection (8) imposes a duty on the court to make an order recalling the warrant and any arrestment or inhibition executed in pursuance of it and gives the court power to make an ancillary order, where it is no longer satisfied as to the matters set out in subsection (9). Those matters mirror the considerations which the court must take into account when determining whether to grant a warrant (see section 15F(3)).

494. Subsection (10) places the onus on the creditor to satisfy the court that a recall or restriction order should not be made. Subsections (11) and (12) enable the court to impose any conditions it thinks fit when making an order which may include requiring the debtor to consign money into court, to find caution or to give some other kind of security as the court thinks fit. The court will order the debtor to inform the creditor and any other interested party about the order (subsection (13)).

495. Subsection (14) provides that this section applies regardless of whether the warrant for diligence on the dependence was obtained, or executed, before the section came into force.

New section 15L – Variation of orders and variation or recall of conditions

496. Under section 15L, the court may, on an application by the debtor, vary an order under section 15K(7) restricting a warrant for diligence on the dependence, or vary or remove a condition imposed under section 15F(6) or 15K(11). Any application under section 15L(1) is to be in the form set out in rules of court. The application must be sent to the creditor and any other person with an interest. Subsection (3) provides that at the hearing about an application made under subsection (2), all interested parties will be able to be heard by the court before any order is made. The court must order the debtor to inform the creditor and any other interested party about the order.

General and miscellaneous

New section 15M – Expenses of diligence on the dependence

497. Section 15M(1) provides that a creditor will generally be entitled to the expenses incurred in obtaining a warrant for diligence on the dependence and the costs in executing an arrestment or inhibition. This is subject to subsection (3)(a) which provides that the court may modify or refuse those expenses where it finds that the creditor was acting unreasonably in applying for the warrant or considers the modification or refusal to be reasonable in all the circumstances, including how the action was decided.

498. Subsection (2) entitles the debtor to claim the expenses incurred in opposing the warrant where the warrant was granted and the court is satisfied that the creditor was acting unreasonably in applying for the warrant. This section is subject to subsection (3)(b) which gives the court a power to modify or refuse those expenses where it is satisfied

that it is reasonable in all the circumstances of the case, including the outcome of the case, to do so.

499. Subsection (4) provides that, apart from the matters covered by subsections (1) to (3), the court retains its discretion to deal with expenses as it thinks fit.

500. Subsection (5) provides that expenses incurred in obtaining or opposing warrant for diligence on the dependence are expenses of process.

501. Subsection (6) preserves existing rules in legislation or common law on the recovery of expenses chargeable against a debtor as are incurred in executing an arrestment or inhibition on the dependence of an action. In particular, section 93 of the 1987 Act applies to the recovery of expenses incurred in executing arrestments.

New section 15N – Application of this Part to admiralty actions

502. Section 15N applies this Part of this Act where it is consistent with the provisions of Part V of the Administration of Justice Act 1956 (c.46) (admiralty jurisdiction and arrestment of ships), to an arrestment on the dependence of an admiralty action as it applies to any other arrestment on the dependence. However, sections 15H (sum attached by arrestment on dependence), 15J (property affected by inhibition on the dependence) and 15M (expenses) do not apply. See also schedule 4 to this Act, which inserts a new section 47B on expenses into the 1956 Act.

Section 170 – Prescription of arrestment

503. This section inserts a new section 95A into the 1987 Act as a replacement for section 22 of the Debtors (Scotland) Act 1838 (which is repealed by schedule 6). This section applies to arrestments on the dependence and to arrestments in execution.

New section 95A – Prescription of arrestment

504. Section 95A(1)(a) provides that, where an arrestment on the dependence of an action is not insisted in, for example where no action is taken on it, then it prescribes (and cannot be enforced) after the expiry of 3 years from the date on which a final interlocutor is obtained by the creditor for payment of all or part of the principal sum which was sought in the action.

505. Subsection (1)(b) provides that, where an arrestment in execution of an extract decree or other extract registered document relating to a debt which is due (so not a future or contingent debt) is not insisted in, it prescribes (and cannot be enforced) after the expiry of 3 years from the date on which the arrestment was executed.

506. Subsection (2) provides that an arrestment securing or enforcing a future or contingent debt, if not insisted in, prescribes after the expiry of 3 years from the date the debt became due.

507. Subsection (3) provides that any time during which a time to pay direction, an interim order under section 6(3) of the 1987 Act or a time to pay order is in effect is to be disregarded when determining the date the arrestment will expire.

508. Subsection (4) excludes earnings arrestments, current maintenance arrestments and conjoined arrestment orders from the application of this section.

509. Subsection (5) provides that this section will apply irrespective of whether warrant for the arrestment is obtained, or the arrestment is executed, before this section comes into force.

510. Subsection (6) defines “final interlocutor” for the purposes of subsection (1)(a).

Section 171 – Abolition of letters of loosing

511. Loosing is a method, by way of signeted letters of loosing, of releasing arrested property which does not extinguish the arrestment itself until the debtor uplifts the arrested property. Section 171(1) abolishes loosing. Subsection (2) provides that the abolition of loosing does not affect the law relating to the loosing of an arrestment of a ship or its cargo, nor does it affect the exercise of any other power of the court to recall or restrict an arrestment.

Section 172 – Abolition of adjudication in security

512. Adjudication in security is similar to adjudication for debt but is available only in relation to future or contingent debts. Section 172 abolishes adjudication in security. Adjudication for debt is abolished by section 79 (see paragraphs 236 and 237 above). (See also paragraph 681681 below for a general description of what is meant by "future" and "contingent" debts).

Part 7 – Interim Attachment

Section 173 – Interim attachment

513. Section 173 inserts a new Part 1A into the 2002 Act (after section 9).

514. Part 2 of the 2002 Act established the diligence of attachment in execution to replace the former diligence over the corporeal moveable property of debtors (poinding). Part 1A provides for attachment (known as "interim attachment") on the dependence. Interim attachment will allow a creditor to attach a debtor's tangible assets (also known as corporeal moveable property) on the dependence of a court action for payment.

Interim attachment
New section 9A – Interim attachment

515. Section 9A(1) creates interim attachment by giving the court power, subject to sections 9B to 9E, to grant a warrant which will authorise the attachment of corporeal moveable property (owned either solely by the debtor or in common with a third party) on the dependence of a court action.

516. Subsection (2) provides that a warrant for interim attachment is competent only where the court action on the dependence of which it is sought contains a conclusion for payment of a sum of money other than expenses.

517. Subsection (3) has the effect of allowing interim attachment on the dependence of petitions in the Court of Session.

518. Subsection (4) makes it clear that interim attachment is available in all sheriff court actions and also sets out definitions of "court", "creditor" and "debtor" for this Part of the 2002 Act. It also provides that expressions used in Part 1A of the 2002 Act which are also used in Part 2 of that Act have the same meanings in Part 1A as those expressions have in Part 2, unless the context otherwise requires. As an example, in Part 1A the "officer" means "the judicial officer appointed by the creditor" by virtue of section 45 in Part 2 of the 2002 Act (as amended by paragraph 30(13) of schedule 5 to this Act).

New section 9B – Articles exempt from interim attachment

519. Section 9B provides that interim attachment may not be used to attach the following assets—

- those inside the debtor's home;
- those which are exempt under section 11 of the 2002 Act, namely—

- equipment which the debtor reasonably requires for a profession, trade or business provided it doesn't exceed £1,000 in aggregate value (or any other sum prescribed in regulations);
- any vehicle reasonably required by the debtor which is not worth more than £1,000 (or any other sum prescribed in regulations);
- a mobile home which is the debtor's only or principal residence;
- any equipment reasonably required for maintenance of a garden or yard beside or associated with the debtor's home; and
- by virtue of the amendment of section 11 by schedules 4 and 5 to this Act, cargo onboard ships and money (as defined in section 175 of this Act);

- a mobile home which is the only or main residence of a person other than the debtor;
- those which are perishable or with potential to deteriorate quickly and to a great extent in condition or value; and
- material for a manufacturing process or goods to be sold as a normal part of a debtor's stock in trade.

Application for interim attachment

New section 9C – Application for warrant for interim attachment

520. Section 9C(1) provides that, at any time before a final decision has been taken in a court action, the creditor may apply for warrant for interim attachment. This section should be read with section 9G, which makes it clear that warrant for interim attachment can be applied for, granted and executed before service of the summons in the action.

521. Subsection (2) requires the application for the warrant: (a) to be in the form, or nearly as may be in the form, specified in rules in court; (b) to be intimated to the debtor and any other interested party; (c) to state where an immediate warrant is being sought before a hearing on the application; and (d) to include any other information which the Scottish Ministers require such applications to contain. That power is exercisable by regulations which (by virtue of section 62 of the 2002 Act) are subject to negative resolution procedure.

522. Subsection (3) provides that, where an immediate warrant is sought before a hearing of the application under section 9E, the application for warrant for interim attachment need not be intimated.

523. Subject to section 9D, which enables the court to grant warrant without an initial hearing, subsection (4) requires the court to fix a date for a hearing on the application and to order the creditor to intimate that date to the debtor and any other person the court thinks has an interest.

New section 9D – Grant of warrant without a hearing

524. Subsections (1) and (2) of section 9D give the court power to grant a warrant for interim attachment without an initial hearing on the application provided it is satisfied that—

- the creditor has a *prima facie* case on the merits of the court action;
- there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor, if warrant for interim attachment were not granted in advance of such a hearing; and
- it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to grant the warrant.

525. Subsection (3) puts the onus of satisfying the court of the case for granting warrant in advance of a hearing on the creditor.

526. Subsection (4) requires the court, on making an order granting warrant for interim attachment without a hearing on the application, to fix a date for a hearing under section 9M (recall of interim attachment) and to require the creditor to intimate that date to the debtor and any other interested party.

527. Where such a hearing has been fixed under subsection (4)(a), subsection (5) applies section 9M as if the debtor or a person having an interest had applied to the court for an order under that section.

528. In applying section 9M, this means that at the hearing the court must consider the validity of the warrant and any interim attachment executed under it. The effect of section 9M(10) is to place the onus on the creditor to satisfy the court that a recall or restriction order should not be made.

529. Where the court is satisfied the warrant is invalid it is under a duty to make an order recalling the warrant or any interim attachment which has been executed under it (the court can also make an ancillary order) (section 9M(5)).

530. Subsection (6) provides that where the court decides that a warrant should not be granted without a hearing and the creditor insists on pursuing the application, the court is obliged to fix a date for a hearing on the application under section 9E and to require the creditor to intimate that date to the debtor and any other interested party.

New section 9E – Hearing on application

531. Section 9E sets out the procedure to be followed at a hearing on an application for warrant for interim attachment. Such a hearing on an application takes place in respect of applications where the creditor either doesn't apply for a warrant to be granted in advance of a hearing or where the court refuses to make an order granting a warrant without a hearing.

532. Subsection (1) places a duty on the court, at the hearing, to give any person who received intimation of the hearing date (namely the debtor and any person appearing to the court to have an interest) the chance to make representations before the court makes a decision on the application.

533. Under subsections (2) and (3) the court may grant the warrant if it is satisfied as to the same matters which it is obliged to consider under section 9D(2), namely that—

- the creditor has a *prima facie* case on the merits of the court action;
- there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor if warrant for interim attachment were not granted; and
- it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to grant the warrant.

534. Subsection (4) puts the onus of satisfying the court that it should grant warrant on the creditor.

535. Subsection (5) provides for intimation of the court's decision to the debtor and any other person it thinks has an interest.

536. Subsection (6) provides that in refusing the warrant the court may impose such conditions as it thinks fit. Subsection (7) gives examples of particular conditions which the court might impose. This is similar to section 15F(6) of the 1987 Act (inserted by section 169 of this Act) – see paragraph 480480 above.

Execution of interim attachment
New section 9F – Execution of interim attachment

537. Section 9F(1) applies sections 12, 13, 15 and 17 (subject to modifications and not section 17(3)(b) and (4)) of the 2002 Act to the execution of interim attachment. Section 12 states on which days, and during which times, it is not competent to execute an attachment. Section 13 allows a judicial officer, when executing an attachment, to assume that articles are owned by the debtor, although the officer is required to enquire as to ownership when attaching articles. Section 15 allows an officer executing an attachment to open shut and lockfast places and requires the officer to value articles attached (or arrange for their valuation). Section 17 requires the officer to make a report of the attachment to the court.

538. Subsection (2) requires the judicial officer, immediately after executing an interim attachment, to serve a schedule of interim attachment on the debtor. Subsection (3) makes further provision in relation to the schedule which should be in accordance with the form prescribed in court rules, should be signed by the officer and should specify the attached articles and their value so far as ascertainable. By virtue of subsection (4), the judicial officer is obliged to provide the debtor with a copy of the schedule of interim attachment or, where that is not practicable, to give a copy of it to a person who is present at the location of the interim attachment. Alternatively, where there is no such person, the officer must leave a copy of the schedule at that location.

539. Subsection (5) makes it clear that references elsewhere in Part 1A of the 2002 Act to the day on which an interim attachment is executed are references to the day on which the schedule of interim attachment is given to the debtor, to a person present or left at the premises where the interim attachment was executed by a judicial officer.

New section 9G – Execution of interim attachment before service

540. Section 9G applies where an interim attachment is executed before the summons in the action is served on the debtor. By virtue of section 9A(3) and (4), "summons" (which is the initiating document in the Court of Session) is construed here as meaning also a petition (in the Court of Session) and, in the sheriff court, an initial writ (in an ordinary action and in a summary application) and a summons (in a summary cause and in a small claim).

541. Subsection (2) provides that, where the summons is not served on the debtor within 21 days of the execution of the interim attachment, the attachment ceases to have effect. This is subject to the power of the court to extend the period within which the summons needs to be served of the attachment is not to fall.

542. Subsections (3) and (4) deal with this and provide that the court may, on the application of the creditor, extend the period having regard to the efforts of the creditor to serve the summons within 21 days and any special circumstances preventing or obstructing service within that period.

Interim attachment: further procedure
New section 9H – Order for security of attached articles

543. Section 9H provides the court with power, on the application of the creditor, the judicial officer or the debtor, to make an order for the safe keeping of articles subject to an interim attachment. The court can, under this section, order attached goods to be moved if they are at risk of damage, for example, by flooding. This section is the equivalent, for interim attachment, of section 20 of the 2002 Act.

Interim attachment: effects
New section 9J – Unlawful acts after interim attachment

544. Section 9J applies the provisions of section 21 (except subsections (3) and (15)) of the 2002 Act (what constitutes an unlawful act after an attachment has been executed) to interim attachment, with relevant modifications.

545. Section 21 prohibits the removal, sale, gifting or other disposal of attached articles and their wilful destruction or damage. To do so is in breach of the attachment and may be dealt with as a contempt of court. Contempt of court is punishable by any of, or a combination of, admonition, fine and, in extreme cases, imprisonment or detention. Section 21(7) requires the debtor to give notification to the creditor and the officer if an attached article is stolen and of any insurance claim which the debtor intends to make. Section 21(10) provides that, where attached articles have been damaged, destroyed or stolen, the court may order that others be attached. Damaged articles may, on the authority of the court, be revalued. Section 21(11) to (14) makes provision for a sum of money to be consigned into court in circumstances where an article is made unavailable (by being moved, damaged, lost, stolen or sold) by the debtor or any third party who knows the article is attached.

New section 9K – Articles belonging to or owned in common by a third party

546. Section 9K(1) provides that the court may make an order releasing an article from an interim attachment where it is satisfied a third party owns the article.

547. Subsection (2) gives the court similar power to release an article from an interim attachment where the court is satisfied that a third party owns the article in common with the debtor and that the continued attachment of the article in question would be unduly harsh to the third party.

548. Subsection (3) applies section 34(2) of the 2002 Act where a third party claims sole ownership of the article as it applies where a third party makes an application for the purposes of section 34(1)(b)(ii). This has the effect of preserving a third party's rights so that that the third party is not precluded from taking any other proceedings for the recovery of the article.

549. Subsection (4) provides that, where the interim attachment of an article ceases to have effect under subsection (1) or (2), the judicial officer may attach other articles which are owned by the debtor and kept at the place at which the original interim attachment was executed.

New section 9L – Duration of interim attachment

550. Section 9L(1) provides that an interim attachment, unless recalled, will continue to have effect—

- for a period of 6 months after the conclusion of the action on the dependence of which interim attachment was executed provided—
  - the creditor obtains a final interlocutor for payment of all or part of a principal sum concluded for;
  - the creditor obtains a final interlocutor in the creditor's favour in respect of another remedy concluded for in that action such as an action for delivery; or
  - where the final interlocutor is of absolvitor or dismissal, the court grants a decree in relation to expenses under section 9Q(1)(b);
- until the court grants decree of absolvitor in favour of the debtor or dismisses the action and no decree for expenses under section 9Q(1)(b) is granted; or
- when, by virtue of section 9L(3), the creditor agrees to the interim attachment ceasing to be in force in relation to every attached item.

551. Subsection (2) provides that an interim attachment ceases to have effect if an attached item is attached by the creditor in execution of the final interlocutor or decree mentioned in subsection (1)(a).

552. Subsection (3) provides that the creditor may at any time agree in writing to the interim attachment ceasing to have effect in relation to a specific attached item. The attachment ceases when the court is so notified.

553. Subsection (4) provides that the court may, on application by the creditor, extend the time an interim attachment continues to have effect after final interlocutor in the creditor's favour, but only if the application is made before the 6-month period expires and the court is satisfied that exceptional circumstances make it reasonable to grant the application.

554. Subsection (5) provides that an application by a creditor under subsection (4) for an extension to the 6-month period must be in the form prescribed in rules of court and must be intimated by the creditor to the debtor and any other interested parties. The creditor must also intimate the court's decision on the application to the same parties (see subsection (6)).

555. Where an application is made under subsection (4) but not determined before the expiry of the 6-month period, subsection (7) has the effect of extending that period until the application is disposed of.

556. Subsection (8) makes it clear that the calculation of the 6-month period under subsection (1)(a) should not include any period during which a time to pay direction, interim order or time to pay order under the 1987 Act is in existence.

557. Subsection (9) defines, for the purposes of subsection (1), what a "final interlocutor" is and when an action is "disposed of".

Recall etc. of interim attachment

New section 9M – Recall or restriction of interim attachment

558. Where warrant for interim attachment has been granted, the debtor or any other person having an interest can apply to the court for any order set out in section 9M(2). Those orders are an order recalling or restricting the warrant granted, if the warrant has been executed, an order recalling or restricting any interim attachment so executed, an order determining any question as to the validity, effect or operation of the warrant or an order ancillary to any other order sought.

559. Subsection (3) provides that any application under subsection (2) must be in the form set out in rules of court. The application must be sent to the creditor and any other person with an interest. Subsection (4) provides that at the hearing about an application made under subsection (2), all interested parties will be able to be heard by the court before any order is made.

560. Subsection (5) provides that, where the court is satisfied the warrant is invalid, it is under a duty to make an order recalling the warrant and any interim attachment which has been executed under it (the court can also make an ancillary order).

561. Subsection (6) imposes a duty on the court to recall the interim attachment if the court is satisfied that an interim attachment executed in pursuance of a warrant is incompetent. Again, the court can make any orders ancillary to such a recall as it thinks fit.

562. By virtue of subsection (7), where the court decides the warrant is valid it may still make an order recalling or restricting the warrant or interim attachment done under it (and any other order mentioned in subsection (2)) if it considers that an interim attachment executed in pursuance of the warrant is irregular or ineffective or if it is reasonable in all the circumstances, including the effect granting warrant may have had on any person

having an interest, to do so. The power in subsection (7) is subject to subsections (8) and (11).

563. Subsection (8) imposes a duty on the court to make an order recalling the warrant and any interim attachment executed in pursuance of it and gives the court power to make an ancillary order, where it is no longer satisfied as to the matters set out in subsection (9). Those matters mirror the considerations which the court must take into account when determining whether to grant a warrant (see section 9E(3)).

564. Subsection (10) places the onus on the creditor to satisfy the court that a recall or restriction order should not be made.

565. Subsection (11) prevents the court from making an order under subsection (7) where, by virtue of section 9L(1)(a), the interim attachment continues to have effect after the creditor obtains a final interlocutor for payment and the relevant 6-month period has not expired.

566. Subsections (12) and (13) enable the court to impose any conditions it thinks fit when making an order which may include requiring the debtor to consign money into court, to find caution or to give some other kind of security as the court thinks fit. The court will order the debtor to inform the creditor and any other interested party about the order (subsection (14)).

New section 9N – Variation of orders and variation or recall of conditions

567. Under section 9N, the court may, on an application by the debtor, vary an order under section 9M(7) restricting a warrant for interim attachment, or vary or remove a condition imposed under section 9E(6) or 9M(12).

568. Subsection (2) provides that any application under subsection (1) is to be in the form set out in rules of court. The application must be sent to the creditor and any other person with an interest. Subsection (3) provides that at the hearing about an application made under subsection (1), all interested parties will be able to be heard by the court before any order is made.

569. Subsection (5) provides that, on making any order under this section, the court must also order the debtor to intimate the order to the creditor and any other interested parties.

General and miscellaneous provisions

New section 9P – Expenses of interim attachment

570. Section 9P(1) provides that, subject to subsection (3)(a), a creditor will generally be entitled to recover from the debtor the expenses incurred in obtaining and executing a warrant for interim attachment.

571. Subsection (2) provides that, subject to subsection (3)(b), where a warrant for interim attachment is granted and, at a later date, the court is satisfied that the creditor was acting unreasonably in applying for it, a debtor will be entitled to recover from the creditor the expenses incurred in opposing that warrant.

572. Subsection (3) provides that the court may modify or refuse those expenses mentioned in subsection (1) if it is satisfied that the creditor was acting unreasonably in applying for the warrant or if it is reasonable in all circumstances, including the outcome of the action. It can also modify or refuse those expenses mentioned in subsection (2) where it is satisfied that it is reasonable in all the circumstances, including, again, the outcome of the action.

573. Subsection (4) provides that, subject to subsections (1) to (3), the court may make such findings as it thinks fit in relation to expenses as mentioned in subsections (1) and (2). Subsection (5) provides that expenses incurred in obtaining or opposing a warrant are expenses of process.

New section 9Q – Recovery of expenses of interim attachment

574. Section 9Q(1) provides that, subject to subsection (4), any expenses chargeable against the debtor which are incurred by the creditor in carrying out an interim attachment can be recovered only by attachment of the debtor's assets—

- in execution of a decree granted by virtue of—
  - the conclusion for payment in the action on the dependence of which the warrant for interim attachment was granted; or
  - another conclusion in the creditor's favour in that action (such as decree for delivery); or
- where the court finds for the debtor, in execution of a decree granted under this subsection for the purposes of recovering the appropriate expenses.

575. Subsection (2) provides that any expenses which cease to be recoverable under subsection (1) will no longer be chargeable against the debtor.

576. Subsections (3) and (4) provide that expenses remain chargeable against the debtor under subsection (4) where—

- an interim attachment is recalled on the making of a time to pay direction, an interim order or a time to pay order under the 1987 Act;
- the interim attachment was in effect immediately before the date of sequestration of the debtor's estate under the 1985 Act or the appointment of an administrator under Part 2 of the Insolvency Act 1986;
- the interim attachment was in effect against property of the debtor immediately before a floating charge attaches all or part of that property;
- the interim attachment was in effect immediately before the commencement of the winding up, under the 1986 Act, of the debtor; or
- the interim attachment becomes unenforceable because the creditor enters into a composition contract or accedes to a trust deed for creditors or by virtue of the subsistence of a protected trust deed for creditors.

577. Subsection (4) also has the effect that, where the debtor's obligation to pay the expenses is not discharged under the proceedings and processes referred to in subsection (3), those expenses are recoverable in pursuance of subsection (1).

New section 9R – Ascription of sums recovered while interim attachment is in effect

578. Section 9R provides that, where any amounts are secured by an interim attachment or paid to account of the amounts recoverable from the debtor while the attachment is in force, and then the interim attachment ceases to have effect, those sums are ascribed to the heads of claim set out in subsection (2) in the order in which they appear.

579. Subsection (2) provides that those amounts will be credited in the following order: first, to the expenses incurred in obtaining warrant for and executing the interim attachment; secondly, to any interest on the principal sum due under decree in the action which has accrued as at the date of carrying out the interim attachment; and, finally, any sum due under that decree together with any interest which has accrued after that date.

580. Subsection (3) provides that where an interim attachment is followed by the diligence of attachment, section 41 of the 2002 Act (which deals with ascription) will apply to amounts to which section 9R applies as it applies to amounts to which that section applies.

New section 9S – Ranking of interim attachment

581. Section 9S provides that in competition with the claims of other creditors of the debtor, whether those claims are secured by voluntary securities or other diligences or are unsecured, the interim attachment will be treated, on final conclusion of the action in the creditor's favour, as if it were an attachment under section 10 of the 2002 Act executed on the day of execution of the interim attachment.

582. Also, where an interim attachment has ceased to have effect in relation to any specific article on the attachment of it in execution of a final interlocutor in the creditor's favour, the attachment of the item will be taken to have been carried out, in respect of that item, when the interim attachment was carried out.

Part 8 – Attachment of Money

Money attachment

Section 174 – Money attachment

583. Section 174(1) establishes a new diligence of "money attachment" which can be used to attach "money" (as defined in section 175) owned by a debtor.

584. Subsection (2) provides that money attachment is permitted to enforce payment of a debt only if—

- the creditor holds a court decree or other enforceable document by which the debt is constituted (the definitions of "decree" and "document of debt" which apply to this Part by virtue of section 198(1) are set out in section 221);
- a charge to pay has been served on the debtor;
- the period for payment set out in the charge (14 days, or 28 days if the debtor is outside the UK or the debtor's whereabouts are unknown – see section 90(3) of the 1987 Act) has expired without the debtor having made payment of the debt; and
- where the debtor is an individual, the creditor has, no earlier than 12 weeks before executing the money attachment, provided the debtor with a debt advice and information package (being the package issued under section 10(5) of the 2002 Act – see section 221).

585. Subsection (3) provides that money in a dwellinghouse cannot be attached. The meaning of "dwellinghouse" here has the same meaning as in section 45 of the 2002 Act (see section 198(1)). Accordingly, a dwellinghouse does not include a garage even if it is built into the house nor does it include garden sheds or other outbuildings but a caravan, houseboat or other place used as a dwelling can be regarded as a dwellinghouse. Subsection (3) also provides that money attachment is not competent when the money is capable of being arrested. That is to say the money is held on behalf of a debtor by a third party, for instance a cheque made out to a debtor is being held by the debtor's solicitor or accountant.

Section 175 – Meaning of "money" and related expressions

586. This section deals with what is meant by "money" and so clarifies what can be attached by the new diligence.

587. "Money" means cash and banking instruments but excludes any cash or instrument which has an intrinsic value greater than any value it may have as a medium of exchange (which, in simple cases such as coins and notes, will be the face value). An example would be a collectable coin which has a greater value as a collectable coin than it has as a medium of exchange. Such money, whilst excluded from money attachment, will instead be attachable by the diligence of attachment.

588. "Cash" is defined as coins and banknotes in any currency. "Banking instrument" is defined as meaning—

- cheques and other instruments to which section 4 of the Cheques Act 1957 (c.36) applies. Section 4 covers—
  - cheques;
  - other documents issued by a customer of a bank which permit a person to receive payment from the bank of the sum stated in the document;
  - documents which enable a person to obtain payment from the Paymaster General or the Queen's and Lord Treasurer's Remembrancer (often referred to as government cheques); and
  - bankers drafts;
- any document issued by a public officer which entitles a person to payment of a sum from a government department (these are effectively another form of government cheque). Subsection (2) clarifies what the reference to "government department" includes. This term is wide and encapsulates Ministers and departments from all administrations. Documents under section 4(2)(c) of the Cheques Act 1957 are excluded from this part of the definition not because they aren't covered but simply because the reference to "cheques and other instruments" already covers them;
- promissory notes (other than banknotes). A promissory note is an unconditional promise in writing and made by one party to another engaging to pay, on demand or at a fixed determinable future time, a sum certain in money to, or to the order of, a specified person, or to a bearer. The most common example is banknotes. However, these are already defined to mean "cash" for the purposes of money attachment and so are expressly excluded from the definition of "promissory note";
- other negotiable instruments. This covers other negotiable instruments which are not already expressly defined such as dividend warrants; and
- money orders and postal orders. It is necessary to expressly include this category of instrument as they are not negotiable instruments.

589. Subsection (1) also makes it clear that references to "the value of money" in the sections relating to money attachment, unless the context otherwise requires, is a reference to—

- the amount of cash (coins and banknotes);
- in the case of currency other than sterling, the equivalent sterling amount; and
- in the case of a banking instrument, the amount of cash that would be obtained by realising the value of the instrument (for example, the amount credited to a bank account when a cheque is banked).

590. Subsection (3) gives the Scottish Ministers power to modify the definition of "banking instrument" by order made by statutory instrument subject to the negative resolution procedure of the Scottish Parliament. This power could be used where either a type of banking instrument referred to in this section becomes obsolete or if a new type of instrument were created in the future.

Section 176 – When money attachment not competent

591. Subsections (1) and (2) of section 176 provide that money attachment cannot be carried out on a Sunday, a public holiday in the area in which the attachment is to be carried out or on any other day designated by rules of court. An attachment must not begin before 8 a.m. or after 8 p.m. and cannot continue after 8 p.m. if it is in progress. A judicial officer can, however, apply to the sheriff for authority to commence a money attachment or to continue to carry it out outwith these times.

592. Subsection (3) provides that a second money attachment cannot be executed in the same place as a money attachment has already been executed if the second attachment is to enforce the same debt unless other money has been brought to that place after the first money attachment has taken place. The words "or is purported to be attached" make it clear that even if the first money attachment turns out to be invalid a second money attachment at the same place is not permitted because of this provision. This, however, is subject to certain exceptions (contained in sections 183(12)(b), 186(3)(b) and 191(4)). A second attachment at the same place will be allowed where, for instance, attached money has been released because it was not owned by the debtor. The judicial officer can therefore attach other money owned by the debtor.

593. Subsection (4) provides that money can be attached only once to enforce a particular debt. If money is attached and the money attachment ceases to have effect, the money is released back to the debtor. It cannot be re-attached for the same debt.

Execution of money attachment

Section 177 – Removal of money attached

594. Subsections (1) and (2) of section 177 provide that the judicial officer executing a money attachment can attach and remove money only up to an amount which, in the opinion of the judicial officer, does not exceed the amount claimed in the charge plus any interest together with all expenses chargeable against the debtor for the money attachment. This amount of money is referred to as the "sum recoverable by the money attachment" throughout the money attachment sections. Because the expenses of the money attachment are not settled until the end of the process and the value of some banking instruments may not be immediately ascertainable, the judicial officer has to take a view on how much attached money would represent the sum recoverable.

595. Subsections (3) and (4) put a duty on the judicial officer to convert any non-sterling cash into sterling as soon as reasonably practicable and to obtain the best amount practicable for it. All cash in sterling, including that which has been converted from foreign currency, is to be deposited in a bank account (subsection (5)).

596. Subsection (6) provides that the officer does not need to attach and remove any banking instrument other than cheques unless instructed to attach instruments like this by the creditor. If the creditor does not instruct the officer to attach these other instruments, the officer cannot be liable for any loss incurred by a failure to attach those instruments. Where a banking instrument is attached, the officer must have it valued at the price it is likely to fetch on the open market unless the officer thinks a professional valuation is needed (subsection (7) and see also section 180).

Section 178 – Presumption of ownership

597. Section 178(1) provides that a judicial officer carrying out a money attachment can assume that any money found in the premises where the attachment is being carried out is owned wholly or in part by the debtor. But, before attaching any money, the officer must ask anyone present about the ownership of the money and particularly ask whether the money is owned by the debtor in common with someone else (subsection (2)).

598. Subsections (3) and (4) provide that an officer cannot presume that money is owned wholly or in part by the debtor if the officer knows or ought to know that this is not the case. But a simple assertion by a person that the money is not owned by the debtor is not enough to override the presumption that the debtor owns the money. The officer would need to be presented with more information or evidence that the money was not the debtor's before the officer would be precluded from relying on the normal assumption.

Section 179 – Schedule of money attachment

599. Section 179(1) provides that a judicial officer, immediately after carrying out a money attachment, must complete a schedule of money attachment. The schedule of money attachment is a document which will contain all the details about the money which has been attached. It may either be a paper document or it can be completed electronically, in which case it would need to include an electronic signature (see section 198(3)).

600. Under subsection (2)(b)(ii), the schedule must specify the value of the attached money but only so far as ascertainable because the officer may not have been able to make an accurate valuation of all the attached instruments at the time of executing the attachment.

601. Under subsection (3), the judicial officer must give a copy of the schedule to the debtor. Where this is not practicable, perhaps because the debtor is not present at the time, a copy must be given to any other person present at the place where the money attachment was executed or, if nobody is there, the officer must leave a copy at that place.

602. Subsection (4) provides that the day on which a money attachment is carried out is to be the day on which the judicial officer hands over a copy of the schedule under subsection (3). This is to make it clear when the money attachment is executed and, in particular, it clarifies that banking instruments may be attached even though the officer decides that a professional valuation of them is needed. In practical terms, it may not be possible to have such a valuation carried out on the same day as the money attachment. This section makes it clear that, nevertheless, the instruments are still attached pending that valuation.

Section 180 – Valuation of banking instruments

603. This section gives a judicial officer the power to seek a professional valuation of a banking instrument where the officer thinks it is appropriate to do so. In particular, this may be necessary for complex negotiable instruments where the value on the open market may not be obvious to a non-expert. The costs of obtaining a valuation are charged to the creditor but may be recoverable from the debtor under section 196 and paragraph 1(c) of schedule 3.

Section 181 – Order for realisation of money likely to deteriorate in value

604. This section permits a creditor, judicial officer, or debtor to apply to the sheriff for an order allowing the creditor or officer to immediately realise the value of any of the attached money. The sheriff may grant such an order if the sheriff thinks the money in question is likely to deteriorate quickly and substantially in value. An example would be a banking instrument denominated in the currency of a country where the economy was collapsing and that currency was very quickly losing value on the money markets.

605. Subsection (4) authorises the officer to act as the irrevocable agent of the debtor and to take any of the steps set out in section 184(3), so the officer can do anything to realise the value of the money that the debtor could do such as presenting a cheque payable to the debtor for payment.

Section 182 – Report of money attachment

606. Section 182(1) requires the judicial officer to make a report of the money attachment within 14 days of the day the money attachment is executed, unless the judicial officer has requested, and the sheriff has authorised, a longer period.

607. The report will be a detailed account of the money attached and must include the value of all the attached money (including any money which required a professional valuation), the details of any ownership dispute and the details of any money already released. As with the schedule of money attachment, the report can be

made electronically but would require an electronic signature in accordance with section 198(3).

608. Under subsection (5) the sheriff may refuse to receive a report if the stipulated period has expired or the report is not in the correct form. Where the sheriff does refuse the report the money attachment ceases to have effect and the officer has to return the money attached or, where it has already been realised, a sum equivalent to the money attached.

Release of money attached

Section 183 – Creditor's application for payment order

609. This section permits the creditor to apply to the sheriff for an order (a "payment order") permitting the creditor to receive payment of the sum recoverable out of the attached money. A payment order can be applied for only in relation to attached money not already released.

610. The creditor must apply for a payment order within 14 days of the date on which the report of the money attachment is made (subsection (3)), otherwise the money attachment ceases to have effect (see section 187(1)). The application is to be in the form prescribed in rules of court. The creditor must send a copy of the application to the debtor, the judicial officer and any other interested party (subsection (4)). The debtor or any person claiming ownership of the attached money may oppose the application (subsection (6)). An opposition to the order must be made in the form prescribed in court rules, within 14 days of the application for a payment order (subsection (7)). The sheriff must allow the creditor, debtor and any third party who opposes the order to make representations or alternatively the sheriff can hold a hearing (subsection (8)). If the opposition is on the grounds that the money attached is not owned by the debtor, the burden of proving that falls on the debtor or the third party claiming ownership (subsection (9)).

611. Under subsection (5), the sheriff must make a payment order unless—

- there has been a material irregularity in the execution of the money attachment (subsection (10)), for example that the money attachment has been executed on a Sunday without authority from the sheriff;
- the sheriff is satisfied that the money is not owned by the debtor (subsection (12));
- there is an opposition to the payment order being made (subsection (6)).

612. If there is a material irregularity or an opposition is upheld, the money attachment ceases to have effect and the money must be returned to the original owner (either the debtor or a third party who correctly claimed ownership). If the opposition was only in relation to some of the money attached then the attachment only ceases in relation to that money and only that money is returned.

613. Subsection (12) provides that the sheriff may make an order declaring that the money attachment ceases to have effect if the sheriff is satisfied that any money attached is not owned by the debtor. After such an order is made a judicial officer may attach other money which the debtor owns and which is kept at the same place where the original money attachment was carried out.

Section 184 – Effect of payment order

614. Section 184(1) provides that a payment order authorises a judicial officer to realise the value of money attached and pay the creditor the sum recoverable (with any surplus to the debtor) whilst first retaining an amount to meet the officer's fees and outlays. By virtue of amendments in paragraph 13(3) of schedule 5 to this Act, the disposal of the money is subject to section 37 of the 1985 Act. This has the effect of

equalising diligences executed within 60 days before the sequestration of a debtor with the sequestration itself. In those circumstances, the sum to be disposed of becomes part of the debtor's sequestrated estate and is distributed accordingly.

615. Subsections (2) and (3) authorise the officer to act as the irrevocable agent of the debtor in relation to attached cheques and negotiable instruments and to do anything the debtor could have done to realise the value of the instrument, for example, presenting a cheque for payment.

616. Subsection (4) imposes a duty on the officer to obtain the highest amount as is reasonably practicable for any instrument being realised.

Section 185 – Release of money where attachment unduly harsh

617. This section provides the sheriff with power, on the application of the a debtor before a payment order is made or a money attachment ceases, to order the release of the money attached (or a portion of it) up to £1,000, or other sum set by the Scottish Ministers in regulations, on the grounds that the attachment is unduly harsh to the debtor.

618. It is for the sheriff to decide whether, in all the circumstances, the attachment is unduly harsh. This is likely to require a balancing exercise by the sheriff as to the impact of the money attachment on the debtor (and possibly any relevant third parties such as dependents or employees) as compared with the detrimental effect to the creditor of releasing up to £1,000 of the money attached.

619. Where the attached money includes a banking instrument the judicial officer is authorised by any order under this section to realise the value of the instrument, to pay the debtor the amount set out in the order and to deposit any remaining money in a bank account. Again, the judicial officer is entitled to act as irrevocable agent of the debtor when doing so.

620. Subsection (7) provides that where a judicial officer has realised the value of an instrument so as to pay a sum back to the debtor as required by an order under this section, and the amount realised is less than the amount specified in the order, the order is deemed to have specified that lesser amount and the officer need pay only that amount to the debtor.

Section 186 – Invalidity and cessation of money attachment

621. This section provides the sheriff with the power to order a money attachment to cease and to return any money attached (or a sum equal to the money's value if the money has already been realised) to the debtor (or third party owner) where either there was a material irregularity in the execution of the money attachment or the sheriff is satisfied that the money attached did not belong to the debtor.

622. If the sheriff is satisfied that only part of the money attached did not belong to the debtor, the sheriff can order that part to be returned to the third party who does own the money in question. The judicial officer may attach other money owned by the debtor and kept in the place the original attachment was executed.

623. An order can be made on the sheriff's own initiative (for example, if the report of the money attachment discloses an irregularity or an issue about ownership) or can be applied for by the debtor or a third party. A hearing may be held or representations made prior to an order being made and the sheriff has to provide reasons for making an order (or refusing to do so, if it has been applied for).

Section 187 – Termination of money attachment

624. This section provides that where the creditor fails to apply for a payment order before 14 days have expired from the date on which the report of the money attachment is made, or fails to send a copy of the application to the judicial officer, as required by

section 183(4)(b), the money attachment ceases to have effect. It also provides for a money attachment to cease to have effect on payment of the sum recoverable by the money attachment. Where payment of the sum due is offered but not accepted within a reasonable time, the money attachment will also cease.

Section 188 – Redemption of banking instrument

625. Section 188(1) permits a debtor, at any time before 14 days have expired from the date on which the report of the money attachment is made, to buy back a banking instrument. But subsection (2) prevents a debtor from doing so if the instrument is already the subject of an order for immediate realisation (see section 181).

626. If the debtor wishes to buy back the instrument, the debtor must buy it at the value specified in the judicial officer's report of the money attachment (subsection (3)).

627. When the debtor pays the judicial officer, the officer has to issue a receipt and report the buy-back to the sheriff (subsection (4)). The issuing of the receipt stops the money attachment from having any effect on the instrument that has been bought back.

Statement of money attachment

Section 189 – Final statement of money attachment

628. This section requires a judicial officer to make a statement to the sheriff detailing everything that has happened in the course of the money attachment. The officer has 14 days from the later of the day the creditor was paid under a payment order or the day the last of the money attached was returned to the debtor or a third party under the various provisions of this Part (subsections (1) and (2)).

629. The statement must conform to the form prescribed in court rules and must specify details about any banking instruments, the value of which have been subsequently realised, the amount realised for each instrument, any instrument with a value which has not been realised, any chargeable expenses, any sums paid to the creditor, any surplus paid or instruments returned to the debtor and any balance due to or by the debtor (subsection (4)). If the statement is made electronically it will require an electronically certified signature (see section 198(3)).

630. The officer must submit the statement within the time limit; otherwise the officer may be liable for some or all of the expenses of the money attachment unless there is a reasonable excuse for the delay (subsection (6)). The officer may also be reported to the Scottish Civil Enforcement Commission for misconduct if the statement is late or is not submitted (subsection (7) and see section 67).

Section 190 – Audit of final statement under section 189(1)

631. Section 190(1) provides that the sheriff must send the final statement of money attachment to the auditor of court who must check the expenses and fix the amount of expenses chargeable, confirm any balance due by or to the debtor and make a report to the sheriff. Under subsection (2), the auditor of court must not alter the statement without first giving all interested parties an opportunity to make representations. The auditor is not entitled to a fee for making the report to the sheriff (subsection (3)).

632. Subsection (4) provides that once the report from the auditor of court has been received, the sheriff must certify the balance due by or to the debtor but may make modifications to the balance confirmed by the auditor of court. If the sheriff is satisfied that there has been a material irregularity in carrying out the money attachment (other than the timing of the judicial officer's final statement), the sheriff can declare the attachment void. A consequence of that would be that the creditor would not be entitled to any sums paid under, for example, section 188, and these would have to be paid back to the debtor (or a third party, if a third party claimed ownership of the attached money). But even

if the money attachment is declared void a person who, in good faith, has purchased or otherwise obtained money that was attached can keep the money in question and remains the lawful owner (subsection (6)).

General and miscellaneous

Section 191 – Money in common ownership

633. Section 191(1) permits money which is owned in common between a debtor and third party to be attached. Common ownership means that more than one person owns a share of the money.

634. Subsection (2) permits a third party who owns money in common with a debtor to buy out the debtor's share in the money so that the third party becomes the sole owner. This is done by paying the judicial officer an amount equal to the debtor's interest in the money. Before being able to buy out the debtor's share, the third party must first satisfy the officer that the third party is a part owner of the money. But, if the officer is not satisfied, the third party can apply to the sheriff and if the sheriff is satisfied as to the third party's ownership the buy out can go ahead.

635. Subsection (3) provides for the third party to apply to the sheriff for an order declaring the attachment of money owned in common to be unduly harsh to the third party. The application has to be made before the money is paid to the creditor under a payment order or is realised under an order for immediate realisation (see section 181). If the sheriff makes such an order the money attachment ceases in relation to the money owned in common.

636. Under subsection (4), where the third party buys out the debtor's interest in money under subsection (2) or where a sheriff makes an order under subsection (3), the officer is permitted to attach other money owned and kept by the debtor at the place where the original attachment was carried out. This is an exception to the normal rule in section 176(3) that a second money attachment in the same place is not allowed.

Section 192 – Procedure where money owned in common is disposed of

637. Section 192 covers the situation where a third party claims common ownership of money with a debtor and does so before payment to the creditor under a payment order or realisation under an order for immediate realisation but the money is nevertheless paid to the creditor under the payment order or is transferred to another person under the provisions for realisation.

638. If the creditor subsequently admits that the third party was a common owner of the money or the third party satisfies the sheriff of this fact, then the creditor has to pay the third party an amount equal to the third party's share of the commonly owned money.

Section 193 – Unlawful acts after money attachment

639. This section provides that a debtor who realises the value of an attached banking instrument, otherwise relinquishes the ownership of it or obtains, by fraud or other dishonest means, a banking instrument in place of such an instrument is in breach of the money attachment. Anyone who assists the debtor to breach the money attachment (and who knew or ought to have known about the money attachment) is also treated as having breached the money attachment. Such a breach is to be treated as if the person was in contempt of court. Contempt of court is punishable by any of, or a combination of, admonition, fine and, in extreme cases, imprisonment or detention. This section would cover the circumstances in which a debtor, whose cheque had been attached by a money attachment, requested a further cheque from the payer under the pretence that the cheque had been lost or stolen.

Section 194 – Appeals

640. This section provides that an appeal against any decision of the sheriff (except decisions to grant an order for immediate realisation of an instrument under section 181) may be made to the sheriff principal only with the leave of the sheriff and on a point of law. There is no further right of appeal against the decision of the sheriff principal.

Section 195 – Recovery from debtor of expenses of money attachment

641. Section 195(1) provides that expenses of money attachment for which the debtor is liable, can be recovered only by the money attachment in which those expenses are incurred. There is no other permissible method for recovering those expenses.

642. Subsection (2) provides that the expenses have to be recovered before the money attachment ceases to have effect or before the money attached is paid over to the creditor. Note that the amount of money attached is to include an amount to cover expenses (section 177(2)) so that when the money is paid over to the creditor there is an amount covering expenses (and under section 184(1) a judicial officer is entitled to retain an amount to cover the officer's fees and outlays before paying the money attached over to the creditor).

643. Where the debtor opposes a payment order or other application on frivolous grounds or makes an application under the provisions of this Part on frivolous grounds, the sheriff may award expenses relating to any such application, opposition or hearing against the debtor and in favour of the creditor (see paragraph 4 of schedule 3). Subsection (3) provides that in those circumstances decree for payment of those expenses is granted against the debtor and in favour of the creditor so that the creditor can recover those expenses (in other words recovery of those expenses does not have to be done by means of the original money attachment).

644. Subsection (4) lists circumstances (all of which are a type of insolvency process apart from subsection (4)(c) which concerns the realisation of a floating charge) which may prevent a money attachment from proceeding. In those circumstances the expenses of the money attachment are still chargeable against the debtor and if they are not dealt with in the insolvency process they can be recovered by a further money attachment.

Section 196 – Liability for expenses of money attachment

645. Section 196(1) provides that schedule 3 to this Act will determine the creditor's or debtor's liability for the expenses involved in serving a charge and in procedures for money attachment. Power is also given to the Scottish Ministers to modify schedule 3 by adding or removing types of expenses or varying any description of expenses referred to in that schedule. This power is subject to the negative resolution procedure.

Schedule 3 – Expenses of Money Attachment (Introduced by Section 196)

646. Paragraph 1 lists all the expenses incurred in relation to a money attachment that are to be chargeable against a debtor.

647. Paragraph 3 provides that the debtor and creditor are liable for their own expenses in relation to applications, objections, oppositions and hearings under this Part but paragraph 4 allows the sheriff to award expenses against one party in favour of the other if any of these actions are done on frivolous grounds.

Section 197 – Ascription

648. Section 197 provides that, where any sums are recovered by the money attachment or paid by the debtor while the money attachment is in force, those sums will be ascribed to the following heads of claim in the following order—

- the expenses of the money attachment which are chargeable against the debtor;

- any interest on the sum due under the decree accrued up to the date of the money attachment;
- the sum due under the decree (including interest on that sum which has accrued since the date the money attachment was executed).

Section 198 – Interpretation

649. Section 198 defines what is meant by the expressions used in this Part. Subsection (2) provides the Scottish Ministers with power (exercisable by order subject to negative resolution procedure) to modify the definitions of "decree" and "document of debt". Subsection (3) makes provision for electronic signatures where any document that requires to be signed under this Part is submitted in electronic form. The signature has to be a certified electronic signature which complies with the requirements of the Electronic Communications Act 2000 (c.7).

Part 9 – Diligence Against Earnings

Section 199 – Simultaneous operation of arrestments against earnings where net earnings insufficient

650. This section amends section 58 of the 1987 Act so that, where a debtor is subject to both an earnings arrestment and a current maintenance arrestment, those arrestments will rank equally in the deductions from the debtor's earnings if the debtor's net earnings are not sufficient to allow deduction of the full amounts due under each. Under section 58(2) as it stood before the amendments made by this section, the earnings arrestment took priority over the current maintenance arrestment.

651. Subsection (1) inserts new subsections (2) to (4) into section 58 in place of subsection (2). These subsections set out formulae which the employer must use to calculate an equal proportion of the available net earnings to satisfy both creditors when both types of arrestment are operating at the same time.

652. Schedule 3 to the 1987 Act makes provision for the disbursement by the sheriff clerk of deductions made by a debtor's employer under a conjoined arrestment order. Again, under the law before this Act (for which see paragraph 4 of schedule 3), where the sum available for disbursement was not sufficient to allow the full amounts due to each creditor to be paid, priority was given to ordinary debts (i.e. debts which are recoverable by earnings arrestment).

653. Subsection (3) amends paragraph 4 and inserts a new paragraph 4A so that, where the sum available for disbursement is not sufficient, it is divided proportionately among the various creditors rather than priority being given to ordinary debts. Subsection (2) makes a minor amendment of section 63(5)(b) (which deals with how the debtor's employer calculates the sum to be deducted where a conjoined arrestment order is in effect) to clarify the language of that paragraph.

Section 200 – Arrestment of earnings: deductions from holiday pay

654. Section 200, among other things, inserts a new section 49A into the 1987 Act.

New section 49A – Deductions where net earnings include holiday pay

655. New section 49A provides that any holiday pay which is paid on the same day on which normal earnings are paid is to be treated separately from the normal earnings for the purpose of calculating any deductions to be made under an earnings arrestment. On such a pay-day, the amount to be deducted from the normal earnings is calculated in accordance with section 49 as if the holiday pay had not been paid. A separate calculation is then made to determine the deduction to be made from the holiday pay.

The holiday pay is treated broadly as if it were normal earnings relating to the period during with the debtor is on holiday.

656. This makes a change to the previous system under which holiday pay was added to the normal earnings and the deduction was calculated on the basis of that aggregated payment.

Section 201 – Provision of debt advice and information package

657. This section amends sections 47 (earnings arrestments), 51 (current maintenance arrestments) and 60 (conjoined arrestment orders) of the 1987 Act to impose duties on creditors to provide debtors with debt advice and information packages no earlier than 12 weeks before executing diligence against the debtors' earnings. Subsection (4) also amends section 73 (the interpretation provision for Part 3 of the 1987 Act) to add a definition of "debt advice and information package".

Section 202 – Intimation of arrestment schedule

658. This section amends section 70 of the 1987 Act. Subsection (2) amends section 70(1) to require the judicial officer, when serving an earnings arrestment schedule or a current maintenance arrestment schedule on the employer, to take all reasonably practicable steps to provide a copy of the schedule to the debtor.

659. Subsection (3) inserts new subsections (4A) and (4B) which place a duty on employers on whom an earnings arrestment schedule, a current maintenance arrestment schedule or a conjoined arrestment order is served, in the case of an earnings or current maintenance arrestment, to provide the debtor with a copy of the schedule and, in all cases, to notify the debtor of the date on which the first deduction from salary is to be made together with the amount to be deducted.

Section 203 – Provision of information

660. Section 203 inserts four new sections into the 1987 Act concerned with the provision of information.

New section 70A – Employer's duty to provide information

661. New section 70A is inserted into the 1987 Act and places a duty on an employer, on whom an earnings arrestment schedule, a current maintenance arrestment schedule or a conjoined arrestment order is served, to provide the debtor, creditor and, in the case of a conjoined arrestment order, the sheriff clerk with certain specified information. It also specifies the dates on which the information is to be provided. The information to be provided is set out in subsection (3) and relates to details of the debtor's pay and any deductions from it. A power is given to the Scottish Ministers to prescribe, by regulations, other types of information to be provided under this subsection. That power is exercisable by regulations subject to negative resolution procedure. Subsection (5) also imposes a duty on employers, where an arrestment against earnings is in effect to advise the creditor and, in the case of a conjoined arrestment order, the sheriff clerk if the debtor ceases to be employed by the employer and to provide details of any new employer of the debtor if known.

New section 70B – Failure to give notice under section 70A(5)

662. This section provides that where an employer fails to notify the creditor when a debtor's employment is terminated and provide details of any new employment, the sheriff may, on the application by the creditor, make an order requiring the employer to provide whatever information is known by that employer to the creditor. The sheriff may also order the employer to pay the creditor an amount not exceeding twice the amount which that creditor would have received on the debtor's next pay day had the debtor still been

employed by the employer. Subsection (2) provides that payment of this amount will reduce the debt owed to the creditor by the same amount.

663. Under subsection (3) the employer may, within 14 days of the order being made, appeal, on point of law only, to the sheriff principal, whose decision will be final.

664. By virtue of an amendment of section 105 of the 1987 Act by paragraph 16(13)(c) of schedule 5 to this Act, section 70B does not apply to Her Majesty as an employer.

New section 70C – Creditor's duty to provide information

665. This section specifies the information to be provided by the creditor to the employer and, in the case of a conjoined arrestment order, to the sheriff clerk and the dates on which that information is to be supplied. The information to be provided relates to how much of the debt is still outstanding and how much the creditor has received under the arrestment towards paying off that debt.

New section 70D – Debtor's duty to provide information

666. This section provides that a debtor, who is subject to an arrestment against the debtor's earnings, must notify the creditor and, in the case of a conjoined arrestment order, the sheriff clerk of any change of his or her employer.

Section 204 – Conjoined arrestment orders: jurisdiction

667. This section amends section 73(1)(c) of the 1987 Act to make it clear that the references to the sheriff in particular sections of the 1987 Act are to the sheriff who has jurisdiction over (a) the principal place of employment of the debtor, (b) where that principal place of employment is outside Scotland, any other place of employment in Scotland or (c) where neither of the foregoing apply, the debtor's domicile.

Section 205 – Arrestment of seamen's wages

668. By virtue of section 73(3)(c) of the 1987 Act, wages of seamen (other than fishermen) were not treated as earnings for the purposes of earnings arrestments under the 1987 Act (although they could be subject to a current maintenance arrestment). This section repeals section 73(3)(c) of the 1987 Act. This has the effect of removing this exemption. This section also, as a consequence, repeals section 73(4), which contains definitions of "seaman" and "fishing boat" (expressions used in section 73(3)(c)) which are no longer required.

Part 10 – Arrestment in Execution and Action of Furthcoming

Section 206 – Arrestment in execution

669. Section 206 inserts new Part 3A into the 1987 Act (after section 73). This new Part contains 18 new sections dealing with the diligence of arrestment in execution and the related action of furthcoming.

670. Arrestment is a diligence which allows a creditor to attach a debtor's moveable property, such as goods or funds (for example, funds held in bank accounts). Arrestment can be used only where these assets are owned by the debtor but are in the possession of a third party. The third party is known as the "arrestee" and is often, in the case of funds, a bank or financial institution. If the assets are in the possession of the debtor rather than a third party then the diligence of attachment (or, in the case of money, money attachment) may be available.

671. Arrestment simply attaches the assets held by an arrestee; it does not transfer ownership of the assets to the creditor. To complete the diligence and have the assets handed over or sold, the creditor must raise an action of furthcoming. In many cases, the formal

action of furthcoming is not necessary as the debtor completes a voluntary mandate permitting the arrestee to hand over the assets to the creditor in satisfaction of the debt.

672. The following sections make modifications to certain aspects of the law of arrestment. Those aspects of the law which are unchanged by this Act remain subject to the rules of common law.

New section 73A – Arrestment and action of furthcoming to proceed only on decree or document of debt

673. Section 73A(1) provides that arrestment is permitted only to enforce a court decree (including a summary warrant) or a registered document of debt where the warrant or extract of the decree or document authorises arrestment. "Decree" and "document of debt" are defined in subsection (4). The Scottish Ministers have the power to add, remove or vary these definitions by order made by statutory instrument (subsection (5)). The exercise of this power is subject to negative resolution procedure.

674. Where, however, the decree is a summary warrant, arrestment can be executed only if the debtor has been charged to pay the debt and the period of the charge (14 days, or 28 days if the debtor is outside the UK or the debtor's whereabouts are unknown) expires without the debt being paid (subsection (2)). In any other case, no prior charge is required before arrestment may be executed. Any existing rule of law relating to the types of decrees or documents on which arrestment can proceed is abolished if the rule is inconsistent with these provisions (subsection (3)).

New section 73B – Schedule of arrestment to be in prescribed form

675. This section enables the Scottish Ministers to prescribe the form of schedule of arrestment to be used. This is only required in an arrestment which has not started out as an arrestment on the dependence of a court action. This power is exercisable by regulations subject to negative resolution procedure.

New section 73C – Arrestment on the dependence followed by decree

676. Where a creditor obtains a final decree in the creditor's favour at the conclusion of a court case and the creditor had arrested property of the debtor on the dependence of the action then, under common law, the arrestment on the dependence automatically becomes an arrestment in execution of the final decree. In these circumstances, section 73C provides that the creditor will be required to serve a copy of the final decree, in the form prescribed in rules of court, on the arrestee. This gives the arrestee notice that the arrestment on the dependence has become an arrestment in execution and may be followed by an action of furthcoming, a voluntary mandate to release the assets held or by the automatic release of funds under new section 73J (see paragraphs 696 to 699 below).

New section 73D – Debt advice and information

677. Section 73D imposes a duty on a creditor to provide a debtor who is an individual with a copy of the debt advice and information package during a 48-hour period beginning with the service of either a copy of the final decree in favour of the creditor, following an action on the dependence of which the creditor has executed an arrestment, or a schedule of arrestment in a standard arrestment in execution. If the creditor fails to provide the debt advice and information package, the arrestment shall be invalid. The meaning of "debt advice and information package" in the 1987 Act is set out in section 47(4) (inserted by section 201(1) of this Act), as read with section 106 (as amended by paragraph 16(14) of schedule 5 of this Act).

New section 73E – Funds attached

678. New section 73E provides rules to limit the sums that may be attached by an arrestment in execution which secures sums held by the arrestee (for example, a credit balance in a bank account in the debtor's name).

679. This section changes the common law for most arrestments under which the words "more or less" in the arrestment schedule of a validly executed arrestment in execution attach the whole of the debtor's moveable property in the possession of the arrestee rather than merely enough property to cover the value of the debt due by the debtor to the arresting creditor. That rule operates regardless of the size of the actual debt due.

680. Subsection (1) sets out the circumstances in which the rules in this section apply. For this section to apply to arrestment in execution of a decree there must not have been an arrestment on the dependence of the action in which the decree is granted. The sum attached in those cases is determined at the point at which the arrestment on the dependence is granted (see section 15H of the 1987 Act inserted by section 169 of this Act). Paragraph (b) clarifies that this section applies to an arrestment only to the extent that the arrestee holds funds due to the debtor which are of an ascertainable amount at the time the arrestment is executed. Also, it applies where the arrestee holds the debtor's funds, even where the arrestee also holds other moveable property belonging to the debtor.

681. Debts can be classified as "pure", "future" or "contingent". A pure debt is one which is currently due and can be demanded immediately. For example, the obligation of a bank to an account holder in respect of sums due on a current account. Future debts are an obligation to pay a debt on a certain future date or on the occurrence of an event which must occur. For instance, an obligation to pay a building contractor on completion of a 12 month contract. A contingent debt is a debt which depends on the occurrence of an uncertain future event. For example, the right of an insured car owner to be indemnified by an insurer against a third party claim for damage to a vehicle in a car accident, caused by the insured where the third party has not yet raised a court action for damages, is a contingent debt.

682. Under common law, all of these types of debt are arrestable. However, contingent debts are arrestable only where the right to the debt has vested in the common debtor. It is arrestable for what it may ultimately prove to be worth. Accordingly, pure debts are of an ascertainable amount, future debts may be of an ascertainable amount (although some may not be if they increase, say, in accordance with rising interest rates). Contingent debts, on the other hand, are unascertainable as there is no guarantee that the contingency will be purified.

683. This section, in dealing only with debts to the extent that they are ascertainable, deals only with pure debts and any future debts of an ascertainable amount. For future debts which are not of an ascertainable amount and all contingent debts, the common law applies. That means, rather than the formula set out in subsection (2) applying, because the debt is unascertainable, a sum will be arrested under common law "more or less" for the amount of the debt owed, plus any expenses.

684. For ascertainable debts, subsection (2) provides that the funds attached by the arrestment will be the lesser of—

- the sum held by the arrestee on the debtor's behalf (referred to as the debt due to the debtor by the arrestee because a sum of money held, for example, by a bank in a person's account is in fact a debt owed by the bank to the person for the balance in the account); or

- the sum arrived at by the formula set out in paragraph (b). The formula requires adding up the amount of the principal sum claimed in the decree or document, any expenses chargeable against the debtor under the decree or document, the expenses of carrying out the arrestment, interest on the principal sum up to and including the

date of the arrestment plus interest that may accrue in the year following that and interest on the expenses of the arrestment itself plus an amount to be specified by the Scottish Ministers in regulations which approximates to the average expenses chargeable against a debtor in an action of furthcoming.

685. If the amount held by the arrestee is not enough to cover the sum arrived at under the subsection (2)(b) formula and the arrestee also holds other moveable property belonging to the debtor, subsection (4) provides that the arrestment will attach all the moveable property of the debtor held by the arrestee in addition to any funds due to the debtor and held by the arrestee. Subsection (5) provides that in any other case (in other words, where the amount of money held by the arrestee is enough to cover the amount arrived at in the subsection (2)(b) formula) the arrestment will not attach any other moveable property and attaches only the amount of money arrived at under subsection (2).

686. Subsection (6) ensures that the sum attached under section 73E(2) will only include ascertainable debts and that, in this situation, the creditor cannot unnecessarily attach additional funds relating to unascertainable debts under common law. Where the sum attached in the hands of the arrestee is the amount due in respect of the debt, there is no need to allow attachment of additional funds, otherwise the creditor would attach funds unnecessarily to the detriment of the debtor. There may, however, be circumstances where the arrestee owes unascertainable debts to the common debtor which the creditor ought to have the right to arrest in addition to ascertainable debts to make up the amount of the debt, interest and expenses owed to the creditor. Subsection (6) does not prevent an additional amount of unascertainable debts being attached under common law in those circumstances.

687. Note that any amount of money attached by this section may be reduced by the provisions of new section 73F.

New section 73F – Protection of minimum balance in certain bank accounts

688. New section 73F protects debtors by providing that a minimum level of funds within bank and other accounts cannot be attached by an arrestment.

689. Section 73F applies to both arrestments in execution and arrestments on the dependence providing the arrestment attaches funds of a debtor held by a bank or similar financial institution. It applies only if the debtor is an individual (not a company, partnership or other body or organisation) and the account in question is not a trading account and is not in the name of a company, partnership or other association (subsections (1) and (2)).

690. Subsections (3) and (4) have the effect of preventing the attachment of an amount below the amount which, in an earnings arrestment, cannot be arrested when a person is paid monthly. At the time of the passing of this Act, this amount was set at £370 by the Diligence Against Earnings (Variation) (Scotland) Regulations 2006 (S.S.I. 2006/116). This amount can, however, be varied by the Scottish Ministers under the power conferred upon them in section 49(7)(a) of the 1987 Act (the functions of the Lord Advocate were transferred to the Secretary of State (by virtue of the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999 (S.I. 1999/678) and to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998). So, where the sum held by the arrestee is more than that amount, only the funds over that amount can be attached by an arrestment. If the sum in the debtor's account is less than that amount, no funds are attached.

691. Subsection (5) defines what is meant by "bank or other financial institution".

692. Under subsection (6), the Scottish Ministers may modify the types of account or vary any descriptions of the types of account that section 73F applies to. Also the definition of "bank or other financial institution" may be modified by the Scottish Ministers to add or remove types of financial institution or vary any of the descriptions of the

types of institution. These powers are exercisable by regulations subject to the negative resolution procedure.

New section 73G – Arrestee's duty of disclosure

693. New section 73G places a duty on arrestees to disclose to an arresting creditor the existence of and the value of assets attached by an arrestment. Where nothing is arrested, there is no requirement for the arrestee to provide a "nil" return. The disclosure has to be submitted in the prescribed form within 3 weeks of the date on which the schedule of arrestment is served on the arrestee. A copy of the disclosure must be sent to the debtor and to any person known to the arrestee who owns or claims to own (in common or wholly) the attached property, or to whom attached funds are, or are claimed to be, due (in common or wholly).

New section 73H – Failure to disclose information

694. Section 73H(1) provides that, where an arrestee fails to make a disclosure under section 73G, the sheriff may, on the application of the creditor, order the arrestee to pay the creditor the lesser of either the sum due by the debtor to the creditor or the amount which represents the minimum protected balance in bank accounts which are subject to an arrestment (at the time of the passing of this Act, £370).

695. Subsection (2) provides that in the case of an arrestment on the dependence of an action, the sanction in subsection (1) cannot be applied until the creditor has served a copy of the final decree in the action (see section 73C). The failure to disclose information can be treated as a contempt of court in arrestment on the dependence cases. Contempt of court is punishable by any of, or a combination of, admonition, fine and (in extreme cases) imprisonment or detention.

696. Where the arrestee pays over a sum ordered under subsection (1) following a failure to disclose information, subsection (3) provides that the amount paid reduces the debt owed by the debtor to the creditor by that amount and the arrestee is not allowed to recover that amount from the debtor.

697. Subsection (4) gives an arrestee a right of appeal against an order to pay money to the creditor following a failure to disclose information. The appeal must be made to the sheriff principal within 2 weeks of the date of the order and can only be on a point of law. There is no further right of appeal.

New section 73J – Automatic release of arrested funds

698. New section 73J provides for a procedure by which a creditor can obtain arrested funds automatically after the expiry of defined period. Where funds are released under this procedure there is no need for an action of furthcoming or for the debtor to grant a mandate to release funds.

699. Subsection (1) states that the automatic release of funds can apply only when the arrestment is an arrestment in execution (even if it originally was an arrestment on the dependence) and it attaches funds held by the arrestee and owing to the debtor.

700. The automatic release of funds under this section is to take place at the end of the period of 14 weeks starting on the date of the service of the schedule of arrestment or (if the arrestment was originally executed on the dependence) the date of service of the copy of the final decree. The arrestee can release the funds before the automatic release period has expired if those with an interest in the attached funds authorise the arrestee to do so, by way of a mandate. Automatic release may be prevented by any of the events mentioned in new section 73L(1).

701. Subsection (4) makes it clear that any references in this section and in sections 73K to 73P (which make provision related to automatic release of funds) to funds or sums due do not include references to funds or sums due in respect of future or contingent debts.

As mentioned above at paragraphs 681681 and 682682, future and contingent debts are arrestable. (Ascertainable future debts being arrestable according to the formula set out in section 73E and unascertainable future and contingent debts being arrestable at common law). Accordingly, any arrestment of funds or sums due in respect of future or contingent debts cannot be completed by automatic release. Instead an alternative means of realising the arrestment such as a voluntary mandate or action of furthcoming must be pursued.

New section 73K – Sum released under section 73J(2)

702. New section 73K states how to calculate the amount which is to be released under the automatic release procedure. The sum to be released must be the lowest of—

- the sum attached by the arrestment (which is calculated under section 73E and may be limited by the protected minimum balance provisions in section 73F);
- the amount the arrestee holds on behalf of the debtor (excluding any funds or sums relating to future or contingent debts); or
- the sum calculated under a formula similar to that set out in section 73E(2)(b) but without any amount representing the average costs of an action of furthcoming (which is not needed if the funds are released) and limiting the interest charged to interest up to the date of release (rather than 1 year's interest as under section 73E(2)(b)).

New section 73L – Circumstances preventing automatic release

703. Section 73L(1) sets out the circumstances which prevent an arrestee automatically releasing funds under section 73J. The circumstances are—

- that the arrestee or debtor or any other person to whom funds are due solely or in common with the debtor applies, by notice of objection under section 73M, to the sheriff;
- the debtor makes a hardship application for release of funds or property under section 73Q(2);
- an action of multiplepoinding is raised (which is an action where there are competing claims as to ownership of attached property held by an arrestee, for example more than one creditor of the debtor attempts to arrest the funds); or
- the arrestment is recalled or restricted or otherwise ceases to have effect. An arrestment may be recalled where, for example, the debt in relation to which it has been effected is paid. Recall or restriction can also occur by order of the sheriff where a time to pay order is applied for under Part I of the 1987 Act.

Section 73M – Notice of objection

704. This section provides for the way in which notices of objection to automatic release are dealt with. Debtors, arrestees and third parties may apply to the sheriff by notice of objection for an order recalling or restricting the arrestment of funds.

705. Any objection to automatic release must be on the grounds that the warrant in execution of which the arrestment was executed is invalid, or that the arrestment has been executed improperly or irregularly, or that the funds are due to a third party wholly or in common with the debtor (subsection (4)). Any objection must be made in the form to be prescribed in court rules and must be made within 4 weeks of the schedule of arrestment (or, in the case of an arrestment which was originally on the dependence, the copy of the final decree) being served. The notice must also be given to the creditor, the debtor, the arrestee and any other third party with an interest, known to the person objecting.

706. Subsection (5) prevents any debtor, arrestee or third party, who has raised a notice of objection to the automatic release of attached funds, from raising an action of multiplepoinding or other court action in respect of those funds (for example, an action of furthcoming). There are three exceptions to this which are detailed in subsections (6) and (7). A party who has objected to the automatic release may raise a multiplepoinding or other proceedings where the sheriff makes an order under section 73N(5) sisting the proceedings on the objection. The sheriff might do this where there are complex competing claims to the ownership of the property which would be more appropriately resolved in a multiplepoinding. An objecting party can also enter into an action of multiplepoinding or other proceedings raised by another party.

707. A debtor who has objected to automatic release may, under subsection (7), also apply to the sheriff for release of funds or property because of undue hardship. Where this happens, the sheriff can hear both cases at the same time to ensure the effective use of court time.

New section 73N – Hearings following notice of objection

708. Section 73N(1) provides that the sheriff shall, subject to the circumstances set out in subsection (5), hold a hearing where the automatic release of attached funds is objected to by the debtor, the arrestee or a third party claiming to be due the attached funds (whether solely or in common with the debtor). The hearing must be held within 8 weeks of the day the notice of objection was given to the interested parties. Subsection (2) provides that, before the sheriff can make an order, the creditor, the arrestee, the debtor and any interested third party have the right to be heard at the hearing.

709. Under subsection (3), the sheriff can make an order recalling or restricting the arrestment where the sheriff is satisfied that the objection is upheld.

710. The sheriff can reject the application and order the release of funds to the creditor on the expiry of the 14 week period or, where it has already expired, the release as soon as is reasonably practicable after the date on which the order is made (subsection (4)). Even although the court requires to hold a hearing within 8 weeks of the day on which an objection is made, it is possible that the hearing may not conclude prior to the 14 week time limit for automatic release expiring. The court can still deal with the merits of the case if for any reason it is not possible to determine an application within the 14-week period.

711. Subsection (5) provides that where the sheriff is satisfied that it is more appropriate for the matters raised at the objection hearing to be dealt with by an action of multiplepoinding or other proceedings, the sheriff may make an order sisting the proceedings on the objection. That means effectively putting the objection hearing proceedings "on hold" pending the outcome of the multiplepoinding or other proceedings. The sheriff must also sist the objection proceedings if any multiplepoinding or other proceedings are raised, provided they are raised before a decision is made in respect of the objection application.

712. In addition to making an order recalling or restricting the arrestment, an order for release of funds or an order to sist the proceedings, the sheriff is able to make any other order which the sheriff considers appropriate under subsection (6).

713. Subsection (7) provides that the objector (on order of the sheriff) must inform the creditor, arrestee, debtor and any interested third party of the sheriff's decision on the application. Subsection (8) provides that any party who objects to the decision of the sheriff is able to appeal to the sheriff principal within 14 days of the decision. The appeal may be on a point of law only and the decision of the sheriff principal is final.

714. Further procedure on hearing objections will be set out in rules of court.

New section 73P – Arrestee not liable for funds released in good faith

715. Section 73P makes it clear that arrestees are not liable to the debtor or any other interested party where they release funds in good faith to a creditor because the arrestee was unaware that the warrant in execution of which the arrestment was executed was invalid or the arrestment was incompetently or irregularly carried out.

New section 73Q – Application for release of property where arrestment unduly harsh

716. Section 73Q gives a debtor upon whom an arrestment in execution has been effected (including an arrestment in execution which has started life as an arrestment on the dependence of an action in which the creditor has been successful) and has attached moveable property or funds, the right to apply to the sheriff for an order to be made on the grounds of hardship. This right can be exercised at any time during which the arrestment has effect. For an arrestment of funds to which the automatic release process applies, such an application would require to be made prior to the expiry of the 14 week period for automatic release set out at section 73J(3) or the funds would be automatically released to the creditor.

717. The debtor is able to apply for an order which stops the effect of the arrestment in relation to some or all of the funds and/or property attached and requiring the arrestee to release some or all of the funds and/or property.

718. The application must be in the form prescribed by rules of court and must be copied to persons with an interest, in particular, the creditor and the arrestee.

New section 73R – Hearing on application under section 73Q for release of property

719. Following an application by a debtor under section 73Q, the sheriff may, if satisfied that the arrestment is unduly harsh to the debtor or any other person listed in this section (certain family members), and taking into account the circumstances of the case, make an order for the release of some or all of the arrested funds or moveable property. A sheriff could, for example, take into account whether the arrested funds or some of them were needed by the debtor for what might be termed “essential services” such as to pay a carer or to pay rent.

720. Where funds are attached, the sheriff must, in particular, consider the source of the funds (for example, whether any funds to the credit of a debtor in a bank account derive from state benefits or tax credits) and whether there is already a diligence in effect in relation to those funds, such as an earnings arrestment.

721. Where the sheriff refuses to make a hardship order the sheriff may, where funds are attached, order the automatic release of funds on the expiry of the 14 week period set out in section 73J(3) or, where that period has already passed, as soon as reasonably practicable after the date on which the order to release is made.

722. Where someone wishes to appeal against the decision of the sheriff (for example an aggrieved debtor or creditor), they have 14 days to do so after the decision is made. An appeal may be made to the sheriff principal on a point of law only and the decision of the sheriff principal is final.

New section 73S – Mandate to be in prescribed form

723. Section 73S formalises the voluntary mandate which will enable the arrestee to release arrested funds or other property to creditors without having to proceed to an action of furthcoming. The mandate must now be in a form prescribed by the Scottish Ministers by regulations. If a mandate is not in the prescribed form it is invalid. Subsection (3) provides that where a mandate is invalid but the arrestee pays over funds or hands over property, the arrestee is not liable to the debtor or any other interested party for financial

loss caused by releasing the funds or property provided the arrestee acted in good faith (for example, the arrestee did not know and could not reasonably have known that the mandate was not in the proper form).

New section 73T – Arrestment of ships etc.

724. This section makes clear that the provisions of this Part of the Act do not apply to the arrestment of ships, cargo or other maritime property which are subject to special rules (see, in particular, Part V of the Administration of Justice Act 1956 which is amended by Part 14 of and schedule 4 to this Act).

Part 11 – Maills and Duties, Sequestration for Rent and Landlord's Hypothec

Abolition of maills and duties

Section 207 – Abolition of maills and duties

725. Section 207(1) abolishes the diligence of maills and duties which enabled creditors who had a security over heritable property to recover rents due from tenants of that property. For instance, where a creditor had a security over a debtor's land and the debtor had let the land to a tenant, the creditor could raise an action of maills and duties to attach the rent due from the debtor's tenant. An action for maills and duties was not available to creditors holding standard securities and was therefore not widely used.

726. Subsection (1) also ensures that any legislative provision or rule of law relating to maills and duties no longer has effect.

727. Subsection (2) limits the effect of the abolition by providing that it does not affect any action of maills and duties which has been commenced prior to this section coming into force.

728. Consequential repeals (of obsolete provisions containing references to maills and duties) are included in schedule 6.

Landlord's hypothec and sequestration for rent

Section 208 – Abolition of sequestration for rent and restriction of landlord's hypothec

729. Under the common law a landlord has a right in security over certain moveable property situated in land or buildings which the landlord has let. The security is known as the landlord's hypothec and it secures 1 year's rent due from a tenant. Before the coming into force of this section it would last for 3 months after the last due date for payment of that rent. The security could be enforced by an action of sequestration for rent provided it were raised before the end of that 3 months. The action attached the goods secured by the hypothec and permitted the landlord to obtain warrant to sell the goods in satisfaction of the rent. This action was available to a landlord in addition to any other diligence such as attachment or arrestment which would also be available to the landlord as a creditor of a tenant.

730. Section 208(1) abolishes the diligence of sequestration for rent and subsections (2) to (9) and (11) make various changes to the law relating to the landlord's hypothec as a consequence.

731. The abolition of sequestration for rent does not affect any action for sequestration for rent brought before this section comes into force but the provisions in subsections (4) to (7) limiting the property which is subject to the landlord's hypothec and therefore attachable by sequestration for rent will apply to existing actions (subsection (10)).

732. Subsection (2) preserves the landlord's hypothec and makes clear the nature of the security it confers. It continues as a real right in security over corporeal moveable

property and as a result it gives the landlord an appropriate ranking relating to property over which it confers a security. "Insolvency proceedings" for the purposes of subsection (2) are defined in subsection (12).

733. Subsection (3) clarifies the limitations on the landlord's hypothec and abolishes it as a security over property kept in a dwellinghouse, on agricultural land or on a croft. A "dwellinghouse" for this purpose includes a mobile home, caravan or houseboat used as a dwelling.

734. Under subsection (4), the hypothec will no longer arise in relation to property owned by a person other than the tenant.

735. Subsection (5) provides that the hypothec does not affect any property which is acquired by a third party from the tenant in good faith or, where a landlord has interdicted a tenant from disposing of property subject to the hypothec, any property bought in good faith and for value by a third party from a tenant. But if property is sold by a tenant in breach of an interdict, the tenant remains liable for the breach despite the property no longer being subject to the hypothec due to subsection (5)(b).

736. Where property is in the shared ownership of the tenant and a third party, the hypothec can secure only the tenant's interest in the property (subsection (7)).

737. Subsection (8) provides that the landlord's hypothec is security for any rent for which the date for payment has passed and payment has not been made (so it cannot be security for future rent due) and that it continues as long as the rent remains unpaid. This overrides the common law rule that the hypothec secures 1 year's rent and lapses if not enforced by sequestration for rent within 1 month of the date the rent was due (see subsection (9)). The change made by subsection (8) will apply to any pre-existing hypothec.

738. Subsections (2) to (9) (but not subsection (3)) affect a landlord's right of hypothec which arose before this section comes into force and which subsists on that date (see subsection (11)).

Part 12 – Summary Warrants, Time to Pay and Charges to Pay

739. Sections 209 and 210 make amendments of the 1987 Act and the 2002 Act in relation to the need to serve a charge before executing certain diligences; the availability of time to pay where diligence is proceeding on a summary warrant; and the test the courts must apply in granting debtors time to pay.

740. Summary warrants are used by—

- local authorities to collect council tax, non-domestic rates, and community charge (poll tax) arrears;
- water authorities to collect water and sewerage charges; and
- Her Majesty's Revenue and Customs to collect taxes and duties.

741. Time to pay directions and time to pay orders under the 1987 Act, if granted by the court on application by the debtor, "freeze"—

- further diligence by the creditor; or
- any right of the creditor to apply for sequestration of the debtor.

742. The 1987 Act also requires that a statutory form of charge to pay on 14 days' notice (28 days if the debtor's whereabouts are unknown or the debtor is outside the UK) is served on the debtor in some circumstances, and that certain diligences may be used only if the debtor has failed to pay as charged. Time to pay and charge to pay under the 1987 Act have not previously applied to debts enforced under a summary warrant.

Section 209 – Summary warrants, time to pay and charges to pay

743. Section 209(1) amends section 10 of the 2002 Act by repealing subsection (4) of that section. Attachment under the 2002 Act is competent only after a charge to pay has been served on the debtor and the days of the charge have expired without payment. Subsection (4) provided that no charge needed to be served for attachment where the decree being enforced was a summary warrant. The repeal of that subsection means a charge is now required in all cases.

744. Subsection (2) amends section 1 of the 1987 Act by repealing section 1(5)(e). That paragraph bars a court from making a time to pay direction where the action relates to various debts being pursued by local authorities and other public creditors. The effect of this repeal is that it is now competent for the court, when granting decree for payment in a court action, to make a time to pay direction where the debt relates to—

- rates; or
- council tax, council water charges, community charge or community water charge.

745. Subsection (3) amends section 5 of the 1987 Act by repealing section 5(4)(c) and (e). Those paragraphs bar a court from making a time to pay order where the debt is being pursued under a summary warrant or where the action relates to various debts being pursued by local authorities and other public creditors. The effect of these repeals is that the general bar against time to pay orders on summary warrant debt is removed, and that it is competent for the court to make a time to pay order after decree in respect of the types of debt formerly covered by section 1(5)(e) of the 1987 Act. It should be noted that it remains incompetent to grant a time to pay order in relation to debts of the types listed in section 5(4)(d) and (f) of the 1987 Act (that is, various taxes and duties and social security contributions) regardless of whether they are enforced under a summary warrant or an ordinary decree for payment. Subsection (4) contains amendments consequential on the changes made by subsections (2) and (3).

746. Section 90 of the 1987 Act makes general provision about charges to pay for attachment and for earnings arrestment. Subsection (5) amends section 90 in consequence of the amendment contained in subsection (1) so that the references in section 90 to an attachment being incompetent unless a charge has been served are removed. Provision about that is now contained in the 2002 Act. Subsection (5) also amends section 90 with the effect that a charge to pay is required before a creditor with a debt enforceable under a summary warrant can use the diligence of earnings arrestment.

747. Paragraphs (b), (d) and (e) of subsection (5) further amend section 90 with the effect that the provisions relating to charges to pay (i.e. that it must be in the form set out in rules of court, that diligence must be executed within 2 years of the charge and that a further charge can be served to reconstitute the right to do diligence) apply to all diligences where a charge to pay must be served before diligence is competent (this includes the new diligences of money attachment, land attachment and residual attachment as well as arrestment under a summary warrant decree).

210 – Time to pay directions and time to pay orders

748. Section 210 amends the 1987 Act so that the court is under a duty to grant a time to pay direction or a time to pay order if it is satisfied that it is reasonable in all circumstances, having regard to certain factors. It does so by amending sections 1 (time to pay directions) and 5 (time to pay orders) of the 1987 Act to assist the judiciary in deciding whether or not to grant an application for a time to pay direction or a time to pay order. It requires them to take certain factors into account before deciding on the application. These factors are listed in new sections 1(1A)(a) to (e) and 5(2A)(a) to (e) of the 1987 Act.

749. Section 210 should be read together with the amendments of sections 3 and 10 of the 1987 Act contained in paragraphs 16(3)(a) and (9)(a) of schedule 5 to this Act, which are consequential on (for example) the new diligence of land attachment.

750. Section 3 of the 1987 Act allows a debtor or a creditor to apply to the court which made a time to pay direction for variation or recall of the direction or for the recall or restriction of certain listed diligences. Section 3(1)(a), as amended, will have the effect of requiring the court to consider the reasonableness of the application in the light of all the circumstances.

751. Section 10 of the 1987 Act makes similar provision to section 3 but for time to pay orders. Section 10(1)(a), as amended, will have the effect of requiring the sheriff to consider the reasonableness of the application to vary or recall the time to pay order in the light of all the circumstances.

Part 13 – Amendments of the Debt Arrangement and Attachment (Scotland) Act 2002

Section 211 – Debt payment programmes with debt relief

752. Section 211 amends the 2002 Act to enable debt payment programmes under that Act to include an element of debt relief. The section inserts new section 7A into the 2002 Act.

New section 7A – Debt payment programmes: power to make provision about debt relief

753. New section 7A(1) gives the Scottish Ministers the power by regulations to make provision in relation to debt payment programmes to provide, through such programmes, an element of debt relief. The power allows such programmes to be set up in such a way that debtors do not have to pay off the whole amounts due to creditors under the programmes and for the writing-off at the end of the programme of any debts outstanding.

754. Subsection (2) sets out the particular ways in which that power might be used (although it is not an exhaustive list). These include specifying—

- the minimum part of the debt that will have to be repaid;
- the circumstances when the creditor's consent is needed and how that consent is to be signified;
- the debtor's liability to pay interest, fees or charges arising from the debt;
- the creditor's rights to recover such interest, fees or charges; and
- how, on completion of a debt payment programme, outstanding debts can be discharged.

755. Subsection (3) provides that subsections (3) and (4) of section 7 of the 2002 Act apply to regulations made under new section 7A. This allows the Scottish Ministers to pilot debt payment programmes with an element of debt relief for limited periods and, after assessing the pilot scheme, to provide that such programmes continue to be available.

756. Section 211(4) amends section 62 of the 2002 Act to provide that regulations made under section 7A(1) are subject to affirmative resolution procedure.

Section 212 – Further amendments of the Debt Arrangement and Attachment (Scotland) Act 2002

757. Section 212 makes further amendments of the 2002 Act.

758. Subsection (2) repeals the requirement that a debtor signs an application for a debt payment programme. Subsection (4) repeals the requirement that a debtor or creditor, as appropriate, signs an application for a variation of a debt payment programme. Subsection (3) provides that the requirements set out in sections 3(1) and (2) of the 2002 Act in relation to an application for the approval or the variation of a debt payment programme, which include the requirement for the debtor to obtain the advice of a money adviser, may be changed by regulations made under section 7(1). This amendment is linked to the amendments of section 7 contained in subsection (5).

759. That subsection amends section 7(2) to enable regulations to provide about the circumstances in which some or all of the duties of a money adviser may be carried out instead by an approved intermediary. Subsection (6) clarifies that an approved intermediary is a person (other than a money adviser) who has been approved by the Scottish Ministers as a person who may give a debtor money advice for the purposes of section 3(1) of the 2002 Act. Subsection (5) amends section 7(2) to provide that regulations under section 7(1) may cover the class of person who may act as an approved intermediary and the functions of an approved intermediary.

760. Subsection (5) also amends section 7(2) to allow regulations under section 7(1) to provide about—

- the circumstances in which a debtor can make an application for the approval or variation of a debt payment programme where the debtor has not obtained money advice (whether from a money adviser or an approved intermediary) under section 3(1) of the 2002 Act; and
- the way in which seeking creditors' consent to applications for approval of debt payment programmes or the making of such applications affects the rights and remedies of creditors or other third parties.

761. Subsection (7) amends the definition of "debt advice and information package" to give the Scottish Civil Enforcement Commission, established under section 50 of this Act, the power to determine the content of that package of documents and removing the power of the Scottish Ministers to do so.

762. Subsections (8) and (10) to (13) make a number of amendments of the 2002 Act to facilitate certain aspects of the attachment process which are required to be carried out by judicial officers. It was unclear under the 2002 Act as originally enacted whether the same judicial officer has to be used for certain stages of the attachment process or whether a different officer could be used at each stage. The amendments make it clear that each step in the attachment process can be carried out by any judicial officer.

763. Subsection (9) inserts new section 19A into the 2002 Act.

New section 19A – Urgent removal of attached articles

764. New section 19A gives judicial officers power in relation to the urgent removal of attached articles. Subsection (1) provides that a judicial officer may remove an attached article without notice if it is considered necessary to secure the article (e.g. because there is a risk it may be damaged or destroyed) or to preserve its value and there is no time to obtain an order from a sheriff under section 20(1)(a) of the 2002 Act (which allows such removal). In these circumstances an article will be taken to the nearest convenient premises of the debtor or the person in possession of the item but if the debtor or person does not have any premises which are convenient or the judicial officer thinks those premises are unsuitable for storing the article the officer can take the articles to other secure premises (see subsection (2)). By virtue of subsection (3) (which applies section 19(4)), the judicial officer may open shut and lockfast places in order to remove the attached articles.

765. Subsection (14) inserts new subsections (1A) and (1B) into section 31 of the 2002 Act. Subsection (1A) provides that where an article is sold at auction at less than the value

assigned to it when it was attached, the difference between that price and the value will be credited against the sum owed. In other words the debtor benefits from having the debt reduced by the amount the item was valued at even if it does not actually sell for that value at auction. Subsection (1B) provides that where an article has been damaged and revalued and the damage was not caused by the fault of the debtor and no sum has been consigned into the court by a third party to compensate for the damage, the revaluation is disregarded for the purposes of subsection (1A) and the original value is the value that is credited against the debt after the sale even if the sale price of the item was less than that.

766. Subsection (15) inserts new section 60A into the 2002 Act.

New section 60A – Electronic signatures

767. This section makes provision for electronic signatures where any document that requires to be signed under the 2002 Act is submitted in electronic form (regulations or rules of court made under the Act may permit certain documents to be submitted electronically). The signature has to be a certified electronic signature which complies with the requirements of the Electronic Communications Act 2000 (c.7).

768. Subsection (16)(a) inserts sub-paragraph (oa) into paragraph 1 of schedule 1 to the 2002 Act which provides for the expenses of serving a notice on the debtor setting out the date when an officer intends to enter a dwellinghouse to execute an exceptional attachment order to be chargeable against the debtor.

769. Subsection (16)(b) inserts new paragraph 1A into schedule 1 to the 2002 Act which provides that the expenses of removing attached articles, opening shut and lockfast places for the purposes of removing the articles and storing those articles cannot be charged against the debtor if the articles are removed under the urgent removal provisions of new section 19A(1).

Part 14 – Admiralty Actions and Arrestment of Ships

Section 213 – Admiralty actions and the arrestment of ships: modification of enactments

770. This section introduces schedule 4.

Schedule 4 – Modifications of Enactments Relating to Admiralty Actions and the Arrestment of Ships (Introduced by Section 213)

771. Schedule 4, introduced by section 213, makes amendments to the law relating to admiralty actions and the arrestment of ships.

Definition of "maritime lien"

772. Paragraph 1(c) inserts a new subsection (2) into section 48 of the Administration of Justice Act 1956 (the "1956 Act") defining the term "maritime lien" for the purposes of the 1956 Act and any other legislation where that term is used. In Scots law a "lien" is a right in security over property where that property is in the possession of the creditor. Where a creditor has a right in security over moveable property which is not in the creditor's possession that right is known in Scots law as a "hypothec". However, in international maritime conventions and in other jurisdictions, where a creditor in a maritime claim has a real right in security over a ship, cargo or other maritime property (such as wreck, flotsam or jetsam) which is not necessarily in the creditor's possession, the right is referred to as a "maritime lien". Strictly, a maritime lien is a type of hypothec in Scots law and the insertion of the definition in new subsection (2) makes this clear whilst retaining the usage of the term "maritime lien" to maintain consistency with international usage.

773. Paragraph 2 provides for consequential amendments arising from paragraph 1.

774. The list of claims in respect of which a vessel may be arrested is contained in section 47(2) of the 1956 Act (the "section 47(2) list"). Paragraph 3 extends section 47(2)(r) of the 1956 Act so that it applies to claims arising out of any type of charge held over a ship.

The term "admiralty action"

775. Paragraph 4(a) inserts the term "respondentia" into paragraph (h) of the section 47(2) list. Respondentia is a security granted over the cargo contained in a ship for a loan advanced in consideration of a particular voyage.

776. Paragraph 4(b) inserts new subsection (2A) after the section 47(2) list. This gives the label "admiralty action" to any action (whether in the Court of Session or sheriff court) enforcing a claim in the section 47(2) list.

777. Paragraph 5 provides for two amendments consequential on the creation of the term "admiralty action".

Arrestment *in rem* granted by the sheriff

778. Paragraph 6 inserts new section 47A after section 47 the 1956 Act to set out the jurisdictional limits of a warrant to arrest *in rem* a ship, cargo or other maritime property granted by a sheriff.

New section 47A – Execution of warrant to arrest *in rem* and of order for sale

779. Section 47A(1) provides that the warrant may be executed either within the territorial jurisdiction of the sheriff court from which the warrant was granted, or anywhere in Scotland provided the ship, cargo or maritime property was within the territorial jurisdiction of the sheriff court which granted the warrant, when the warrant was granted.

780. Subsection (2) makes it clear that an order for the sale of an arrested ship may be made in respect of a ship even although the ship is not situated in the sheriffdom when the order is made, where a warrant for arrestment *in rem* granted by the sheriff has been executed.

Arrestment on the dependence

781. Paragraph 7(2) makes amendments to section 47(1) of the 1956 Act which provide that arrestment on the dependence of a ship, or other maritime property which is not cargo, is competent only if, when the ship in question is the ship with which the action is concerned, the defender is the owner of the ship or a share in the ship, or is the demise charterer of the ship, at the time when the arrestment is executed. It continues to be competent to arrest another ship on the dependence providing the defender owns all the shares in that ship.

782. Note that the restrictions imposed by section 47(1) do not apply to the arrestment of cargo which is specifically excluded from this provision by the amendment in paragraph 7(2)(a).

783. Paragraph 7(3) inserts new subsections (1A) and (1B) into section 47 of the 1956 Act. These subsections provide that when a ship has been arrested on the dependence of an action, a warrant cannot be granted to arrest on the dependence of the same action the same ship or any other ship which the defender owns at least a share in unless the pursuer can demonstrate good cause for the second arrestment. This is consistent with the wording in article 3(1) of the leading international convention on the arrestment of ships (the Brussels Arrest Convention of 1952).

784. Paragraph 7(4) amends section 47(3) of the 1956 Act (which provides for the arrestment of a ship to enforce a claim specified in paragraphs (p) to (s) of the section 47(2) list) making it clear that an arrestment to which this provision applies may arrest a share in a ship rather than the whole ship.

Liability for losses and expenses

785. Paragraph 8 inserts new section 47B into the 1956 Act.

New section 47B – Expenses

786. Section 47B(1) provides the court with the power to award the creditor the expenses of obtaining warrant for and executing an arrestment of a ship, cargo or other maritime property on the dependence. But the court may modify or refuse the creditor's right to these expenses if the creditor was unreasonable in applying for a warrant or if the court thinks it is reasonable to modify or refuse the award of expenses (subsection (3)).

787. Subsection (2), entitles the defender to expenses in opposing the grant of the warrant where warrant is granted but the creditor was unreasonable in applying for the warrant. Again the court can modify or refuse these expenses if satisfied that it is reasonable to do so. In particular, the court should take account of the outcome of the action.

788. If any other question arises in relation to the expenses of obtaining or opposing a warrant or of executing the arrestment, subsection (5) provides the court with the discretion to deal with it.

789. Subsection (6) provides that expenses of obtaining warrant for arrestment or opposing the warrant are to be treated as expenses of process.

790. Subsection (7) provides that any legislation or rule of law which deals with the recovery of expenses of executing an arrestment on the dependence of a court action which are chargeable against the debtor is not affected by the rules set down by subsections (1) to (4).

791. Subsection (8) provides the court with discretion to deal with the expenses incurred in obtaining a warrant granted for arrestment *in rem* in enforcing a claim listed in paragraphs (p) to (s) of the section 47(2) list or in opposing an application for it.

Factors affecting arrestments

792. Paragraph 9 inserts new sections 47C and 47D into the 1956 Act.

New section 47C – Competence of arresting cargo

793. Section 47C(1) provides that an arrestment of cargo can be executed only where the cargo is on board a ship when the arrestment is executed. Cargo which is not on board a ship is subject to the diligence of attachment (provided the nature of cargo does not make it exempt from attachment on some other ground). The amendment of section 11 of the 2002 Act made by paragraph 10 prevents cargo from being attached when it is on board a ship.

794. Arrestment of moveable property is normally competent only when the property is in the hands of someone other than the debtor. Attachment is usually the appropriate diligence to use when moveable property is in the hands of the debtor. Subsection (2) makes it clear that, as an exception to the normal position, cargo on board a ship can be arrested where it is in the hands of the debtor or a person acting on the debtor's behalf.

New section 47D – Arrestment of cargo: restriction on movement of ship

795. Section 47D has the effect that where cargo on board a ship is arrested, the ship is itself treated as if it has been arrested until the cargo is taken off the ship. The ship is

therefore prevented from setting sail and the creditor can apply for ancillary warrants to dismantle the ship or have it brought into harbour providing it can be shown that this course of action is necessary.

Cargo on board a ship exempt from attachment

796. See paragraph 793793 above.

Location of a ship when arrestment executed

797. Paragraph 11(a) inserts new subsections (5A) and (5B) into section 47 of the 1956 Act. The new subsections provide that an arrestment of a ship, cargo or other maritime property can be executed no matter where the ship or maritime property is situated so long as it is within the territorial jurisdiction of the court (note that cargo must be on board a ship if it is to be arrested). In other words, a ship is still treated as a ship even where it has run aground or is in a dry dock.

798. Paragraph 11(b) amends subsection (6) of section 47 to make it clear that a ship (or cargo on board it) cannot be arrested while the ship is on passage.

Demise charters

799. Paragraph 12 inserts new sections 47E to 47H into the 1956 Act dealing with demise charterers. A demise charter is a type of lease of a ship (often including the services of the master and crew). A demise charterer takes possession of the ship and operates the ship. The length of demise charters can vary from short (1 or 2 years) to long (20 years or the lifespan of the ship). Often the charterer has an option to buy the ship outright at the end of the agreed term. In practice the demise charterer is treated as the owner of the ship as the charterer has control over the operation of the ship and over the master and crew. But the owner in the legal sense remains the person who granted the charter.

New section 47E – Sale of ship arrested on the dependence of action against demise charterer

800. New section 47E makes special provision to allow the pursuer in an admiralty action against a demise charterer to be entitled to complete diligence by judicial sale of a ship which has been arrested on the dependence of the action. The sale is competent even though the ship is likely to belong to a third party.

801. Subsection (2) provides for termination of the arrestment of the ship if the owner or the demise charterer either pays the debt due, or offers the sum in payment and that offer is not accepted within a reasonable time.

802. Under subsection (3), the court may make an order for the sale of the ship on behalf of the pursuer and, under subsection (4), the court must rank any claims on the proceeds of the sale (but taking into account sections 47F and 47G - see paragraphs 804804 and 805805 below).

803. Subsection (5) provides that a ship so sold transfers to the buyer free from any other claim or encumbrance, including any claim of the previous owner who granted the demise charter. The buyer becomes the new owner of the ship and not just the new demise charterer of it.

New section 47F – Ranking of arrestments on sale of ship chartered by demise

804. New section 47F provides that in competitions in ranking in respect of the proceeds of the judicial sale of a ship, or a share of a ship, arrestment of the ship enforcing the ship owner's debts will be preferred to arrestment enforcing those of the demise charterer even if the arrestment relating to the owner was executed after the arrestment relating to the demise charterer.

New section 47G – Ranking of arresting creditor of demise charterer in sequestration or winding up of owner

805. New section 47G provides that a creditor of a demise charterer who has arrested the chartered ship on the dependence of an action against the demise charterer will be entitled to claim a dividend or preference (if any) resulting from the sale of the ship in the event of the ship's owner being sequestrated or wound up. The creditor has no rights over the proceeds of sale of any other asset belonging to the owner. Subsection (3) applies the provisions of the 1985 Act and the Insolvency Act 1986, which have the effect of equalising diligences executed within 60 days before a sequestration or winding up, to an arrestment against a demise charterer where the ship owner is sequestrated or wound up.

New section 47H – Arrestment to found jurisdiction in action against demise charterer

806. New section 47H has the effect that where a pursuer wishes to raise an action against a demise charterer to enforce a claim listed in the section 47(2) list but the demise charterer is not within the jurisdiction of the court, the pursuer can arrest the ship under demise charter (providing it is within the court's jurisdiction) to found jurisdiction for the action and allow it to be heard by that court.

807. Paragraph 13 amends section 6(c) of the Sheriff Courts (Scotland) Act 1907. It is linked with the provision in new section 47H and it makes clear that the arrestment of a ship within the jurisdiction of the sheriff and which is under demise charter will bring the demise charterer within the jurisdiction of the sheriff even though the charterer would not normally be subject to that jurisdiction.

Part 15 - Action for Removing from Heritable Property

808. This Part sets out a new procedure which is to be followed when ejecting (otherwise known as removing or evicting) a person from heritable property. It does not change the legal grounds on which a person may be removed from heritable property. Instead, it applies general rules for the process of removing.

809. "Removing" has a general meaning which covers any surrender of heritable property, for example, the surrender of a lease (domestic or commercial) by a tenant. It also has a more specific meaning of an action by which a heritable proprietor, such as a landlord, seeks to recover possession of his or her property from a tenant. The conclusion of such an action is the granting of a "warrant of ejection" by the court by virtue of which occupants of the property can be evicted by judicial officers.

810. "Ejection" is the term used for an action where an owner or possessor of heritable property seeks to recover possession from an occupant of the property who has no legal right or title to occupy the property – for example, a squatter.

811. The law has developed in a piecemeal fashion over many years, leading to (for example) different rules for "removing" an occupier who has or had a right to be in heritable property (e.g. a leased office or a dwellinghouse on mortgage default) and for "ejecting" an occupier who has never had a right to be there (such as a squatter).

812. This area of law covers a variety of types of removings, for example, those related to public sector tenancies, private tenancies, commercial tenancies, agricultural tenancies, debt enforcement and squatters. Much of the law is set down in statute and the terminology used in various statutes has given rise to confusion about the procedures which may be invoked for the purpose of obtaining authority to eject someone from land. This part sets out new, general procedures to apply consistently to all types of removings.

Section 214 – Expressions used in this part

813. Section 214 sets out the types of removings that will be covered by the new procedures. These include removings which are authorised by virtue of court decrees, warrants or the types of documents set out in subsection (3). This covers a variety of removings, from ejection of squatters (subsection (2)(b)) to tenants whose housing is subject to a demolition order (subsection (2)(g)). For the purposes of this Part, these are collectively labelled "actions for removing from heritable property" and decrees, warrants and other orders obtained in such actions are labelled "decrees for removing from heritable property".

814. Power is given to the Scottish Ministers by subsection (4) to modify the definitions of decree, warrant or document. If new types of decree, warrant or document are created in the future, this power could be used to extend the new provisions in this Part to them. This power is exercisable by regulations subject to negative resolution procedure.

815. The section following section 214 makes provision for the making of court rules to govern the procedure and practice in execution of a decree of removing from heritable property.

Section 215 – Procedure for execution of removing

816. This section provides that the procedure and practice to be followed in executing any decree for removing from heritable property may be set out in rules of court. Such rules may, in particular, make provision about when a removing is completed (by prescribing notices and forms) and about how effects removed from premises must be dealt with (for example, where they should be taken). Section 218 is also relevant here (see paragraphs 827 to 830 below).

Section 216 – Service of charge before removing

817. Section 216(1) requires a defender to be given 14 days' notice (by way of the service of a charge) before any removing of the defender and of any effects (furniture and so on) can take place.

818. Subsection (2) provides for other occupants of the property who derive right to occupy from the defender to also be removed, and for their effects to be removed, provided the defender has been charged in accordance with subsection (1). Once the period of charge has expired the defender, any other occupants of the property and their belongings can be removed without further warning.

819. Subsection (3) authorises judicial officers to open shut and locked places whilst carrying out the removing, and requires them to make an inventory of any effects removed.

820. Subsection (4) gives the court power to vary the 14-day period or dispense with a charge altogether, on cause shown. This could be used, for example, where the person on whose behalf the removing was being carried out, for example, a landlord, was able to satisfy the court that there was a serious risk of the property being badly damaged during the 14-day period.

821. Subsection (5) simplifies the removings procedure by abolishing any need in Court of Session cases to apply for separate letters of ejection. The warrant in the original application will therefore be enough.

822. Subsection (6) provides that the form of charge may be prescribed by the Scottish Ministers by regulations. Until this power is exercised judicial officers and court rules may provide different forms of charge for different circumstances. Regulations made under this power are subject to the negative resolution procedure.

823. A consequential amendment is made in paragraph 6(3) of schedule 5. It ensures consistency in the period of charge for removings under section 7 of the Sheriff Courts

(Scotland) Extracts Act 1892. It does this by amending the period of charge for such removings in section 7(4) of that Act from 48 hours to 14 days.

Section 217 – When removing not competent

824. Section 217 sets out the dates and times when it will not be lawful to carry out a removing (i.e. on a Sunday, on a public holiday or before 8 a.m. or after 8 p.m.).

825. It will be possible to prohibit carrying out removings on additional days by way of court rules.

826. It also enables a judicial officer to execute a decree for removing from heritable property before 8 a.m. or after 8 p.m. with permission from the sheriff for the district where the property is located.

Section 218 – Preservation of property left in premises

827. Section 218 gives the court a discretionary power, when granting decree for removing, to order the pursuer to preserve the effects (furniture and so on) of the defender or of any other person being removed.

828. This power in subsection (1) does not affect the right of the person carrying out the removing to clear the land and premises of any effects. This is sometimes called leaving the premises "void and redd".

829. The court is being given power to make an order for preservation where it is persuaded that this is appropriate, which may, for example, be the case when such an order will reduce the risk of damage to the occupier's goods.

830. Subsection (2) gives the court power to hold the defender liable for any costs (for example, storage costs) incurred by the person in whose favour the decree for removing is granted.

Section 219 – Caution for pecuniary claims

831. Section 219 abolishes the law on finding caution for "violent profits". Violent profits are due for illegal (i.e. "violent") possession of property, as distinct from (say) rent due from the period before a lease was determined. They are penal damages due on top of any actual loss suffered, so that (say) a landlord is entitled to double the amount of rent that would have been paid.

832. Caution is another word for a security provided by the defender in a court action. Caution is usually obtained by the lodging of money with the court, or by taking out an insurance policy ("bond of caution") that guarantees any payment that may be found due.

833. Under the law before this section, where the pursuer in any removing or ejection claimed compensation for violent profits, the court could order the defender in the action to find caution for violent profits. Where it did so, and if the defender were unable to find caution then the defence would not be heard, and warrant of ejection would be granted without further procedure.

834. The effect of subsection (2) is to make it clear that it is no longer competent for the court to order the defender to find caution for violent profits. Compensation for violent profits is not abolished and may still be claimed.

835. Subsections (1), (3) and (4) provide that the court will be able to order the defender to find caution in the usual way for any non-penal damages that may be claimed by the person seeking to remove the defender, and for which the defender or any occupant deriving right or having permission from the defender may be responsible.

836. A consequential repeal, due to the abolition of caution for violent profits, is set out in schedule 6. That is the repeal of the Ejection Caution Act 1594.

Part 16 – Disclosure of Information

Section 220 – Information disclosure

837. Section 220 deals with the disclosure of information. Subsection (1) gives the Scottish Ministers a power to provide by regulations for the obtaining of information by creditors about debtors by making an application to the sheriff. These regulations may provide for the disclosure of that information to creditors to assist diligence and enforcement of payment of debts due under decrees and document of debts. Subsection (2) sets out some of the things that regulations under subsection (1) could cover. For example, regulations could provide for the circumstances in which applications could be made, the powers and duties of the court in relation to such applications, the types of information about the debtor which may be obtained and from whom and for unauthorised use or disclosure of any information obtained to be an offence.

838. Subsection (3) states that the regulations cannot provide for the debtor to be ordered to disclose information. However, a bank with which a debtor has an account, or an employer of the debtor, could be required to provide information. Subsections (4) and (5) provide for penalties to be applied when an offence is provided for by regulations and set out the maximum levels of penalties which the regulations may impose. Subsection (6) makes it clear that any regulations under subsection (1) do not affect (and do not override) any existing legislation or common law about the power to disclose or use information, or to order its disclosure or use.

839. Subsection (7) states that the disclosure or use of information under the regulations is not to be regarded as a breach of any restriction on the disclosure or use of such information.

840. Subsection (8) details the powers the Scottish Ministers have to vary the definitions of "decree" and "document of debt".

841. By virtue of section 224(4)(b), the first set of regulations made under section 220(1) are to be subject to the affirmative resolution procedure of the Scottish Parliament. Subsequent sets of regulations may be subject either to affirmative or negative procedure in the Scottish Parliament, depending on which procedure the Scottish Ministers consider appropriate, by virtue of section 224(5) read with section 224(3).

Part 17 – General and Miscellaneous

Execution of diligence: electronic standard securities

Section 222 – Registration and execution of electronic standard securities

842. Section 222 introduces a new section 6A into the Requirements of Writing (Scotland) Act 1995 (the "1995 Act").

New section 6A – Registration for preservation and execution of electronic standard securities

843. New section 6A permits an office copy of an electronic standard security, which is registered in the Land Register of Scotland, to be registered for preservation and execution in the Books of Council and Session or in the sheriff court books (the "court books"). An office copy is a paper copy issued by the Keeper of the Registers of Scotland under section 6(5) of the Land Registration (Scotland) Act 1979 (the "1979 Act").

844. Electronic standard securities can be registered in the Land Register as part of the system of electronic conveyancing known as Automated Registration of Title to Land ("ARTL"). The legislative basis of this system is principally found in sections 1(2A) and (2B) and 2A to 2C of the 1995 Act and section 4(2A) to (2C) of the 1979 Act (as inserted by the Automated Registration of Title to Land (Electronic Communications) (Scotland) Order 2006 (SSI 2006/491)).

845. Registration of a document (such as a standard security) in the court books entitles a creditor to use summary diligence to enforce payment of any money due by the debtor. The court books are paper-based and, without section 6A, the holder of an electronic standard security would lose the ability to register it in them and to enforce it by summary diligence.

846. As it is intended to bring the ARTL system on stream in early 2007, section 222 is brought into force on the day after Royal Assent (see section 227(2)).

General

Section 223 – Crown application

847. Section 223(1) provides that this Act binds the Crown but only in so far as the Crown is a creditor. So duties which are imposed on employers by provisions of this Act do not bind the Crown. Subsection (2) makes it clear that amendments made by this Act of other Acts (such as the 1987 Act) bind the Crown to the extent which those existing Acts provide. For example, section 105 of the 1987 Act provides that the 1987 Act binds the Crown both as creditor and as employer. New sections inserted into that Act by this Act will also bind the Crown in both capacities (unless express contrary provision is made – see, for example, paragraph 662 above).

Section 224 – Orders and regulations

848. Section 224 provides for the Parliamentary procedure which is to apply to orders and regulations made by statutory instrument under this Act. It provides for the majority of statutory instruments made under this Act to be subject to the negative resolution procedure of the Scottish Parliament. The exceptions to this are statutory instruments which modify another enactment such as an Act (including this Act), in which case they are subject to the affirmative resolution procedure. In addition, regulations made under sections 50(4), 83(3), 92(2) or (3), 97(7)(b) and 98(6), and the first regulations made under section 220(1), are to be subject to the affirmative resolution procedure. This provision does not apply to statutory instruments made under powers inserted by this Act into other legislation.

849. Subsections (3) and (5) also provide that second and subsequent regulations made under section 220(1) (court-based information disclosure orders) may, at the discretion of the Scottish Ministers, be made subject to either the affirmative or negative resolution procedure.

Section 226 – Minor and consequential amendments and repeals

850. Section 226 introduces schedules 5 (minor and consequential amendments) and 6 (repeals and revocations).

Schedule 5 – Minor and Consequential Amendments (Introduced by Section 226)

851. This schedule contains minor amendments and amendments in consequence of Parts 3 to 16 of this Act. The amendments fall broadly into the following categories—

- amendments consequential on the establishment of the Scottish Civil Enforcement Commission and the creation of judicial officers;

- amendments in consequence of the creation of new diligences (such as land attachment and money attachment);
- amendments in consequence to changes in the law on existing diligences (such as arrestment in execution);
- amendments consequential on the abolition of old diligences (such as adjudication);
- further amendments of the 1985 Act necessary as a result of changes to the law of diligence (see also schedule 1 to this Act);
- further amendments concerning time to pay directions, interim orders and time to pay orders under the 1987 Act (see also section 210 of this Act);
- further amendments of the 2002 Act (see also sections 211 and 212 of this Act).

852. Particular attention is drawn to the following amendments.

Paragraph 10 - Sheriff Courts (Scotland) Act 1971

853. Section 32(1) of the Sheriff Courts (Scotland) Act 1971 provides the Court of Session with power to make sheriff court rules. Paragraph (l) of section 32(1) enables such court rules to provide for a party to proceedings which relate to an attachment to be represented in court by a person who is neither an advocate nor a solicitor (i.e. by a "lay representative"). The section is amended to enable court rules to provide for lay representation in proceedings relating to interim attachment, attachment, money attachment, land attachment and residual attachment.

Paragraph 13(3) - Bankruptcy (Scotland) Act 1985

854. These amendments of section 37 of the 1985 Act, among other things, make provision for the effect of the sequestration of a debtor's estate on the diligence of land attachment. In short, land attachments created within the 6 month period before the date of sequestration are cut down, no land attachment may be created after the date of sequestration, and land attachments created earlier than 6 months before that date and subsisting on it cannot be insisted in unless they have reached an advance stage (such as warrant for sale having been granted and missives concluded). Provision is also made in relation to how sequestration affects arrestments to which section 73J of the 1987 Act applies (automatic release of arrested funds).

Paragraph 16 – Debtors (Scotland) Act 1987

855. The majority of the amendments in this paragraph of schedule 5 are amendments of Part 1 of the 1987 Act are concerned with the effect of the making of time to pay directions, interim orders and time to pay orders on diligence.

856. Provision was already made in Part 1 for the effect on existing diligences (such as attachment and arrestment). The amendments here expand the provision in Part 1 to cover the new diligences of interim attachment, money attachment, land attachment and residual attachment. Provision is also made for the effect of time to pay on arrestments to which section 73J applies (automatic release of arrested funds). (In the case of residual attachment, the power in section 129(8) of this Act to make provision about this should be born in mind – see paragraph 379379 above.)

857. In summary—

- the making of a time to pay direction stops diligence being executed against the debtor;
- an application for a time to pay order may be made, and an order granted, even though diligence has been started but only where it has not reached such an

advanced stage that the creditor should be allowed to complete it (e.g. in a land attachment, the sheriff has granted warrant for sale of the attached land);

- the making of an interim order (an order made pending a decision on an application for a time to pay order) "freezes" existing diligences; and
- the making of a time to pay order stops diligence being executed and freezes diligences already commenced.

Paragraph 30(4) – Debt Arrangement and Attachment (Scotland) Act 2002

858. Paragraph 30(4) of schedule 5 inserts a new section 13A into the 2002 Act.

New section 13A – schedule of attachment

859. New section 13A provides that a judicial officer executing an attachment must, immediately after doing so, complete an attachment schedule. Subsection (2) provides for the format of the schedule to be provided for in rules of court and that it must specify the articles attached. In addition, it must specify, where known, the value of those articles. Subsection (3) requires the officer to give a copy of the schedule to the debtor (or, if that is not possible, to take other steps, the aim of which is to give the debtor notice that the attachment has been executed). Subsection (4) provides that the attachment is executed on the day on which the officer gives the debtor the schedule (or takes those other steps). This is to make it clear when the attachment is executed and, in particular, to clarify that articles may be attached even though the officer decides (under section 15(3) of the 2002 Act) that a professional valuation of them is needed. In practical terms, it may not be possible to have such a valuation carried out on the same day as the attachment. This section makes it clear that, nevertheless, the articles are still attached pending that valuation.